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CIVIL DOCKET

UNITED STATES DISTRICT COURT

Title of Case	Attorneys
JAMES CHAFFIN —vs— LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY	For plaintiff: Glenn Zell Suite 822 15 Peachtree St., N.E. Atlanta, Georgia 30303 (524-6878) For defendant: Lewis R. Slaton, District Atty. Tony H. Hight, Asst. Dist. Atty. Joel M. Feldman, Asst. Dist. Atty. Third Floor Fulton County Courthouse Atlanta, Georgia 30303

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 5 3-23-71 J.S. 6 4-20-71 Basis of Action: Pet. for Writ. of H.C.—seeks to set aside State sentence. Action arose at:	Clerk Marshal Docket fee Witness fees Depositions	FORMA PAUPERIS			

Date 1971	Proceedings	
Mar. 23	Order allowing petition for writ of habeas corpus filed in forma pauperis and directing parties to file briefs and arguments within 20 days, filed.	
	Petition for Writ of Habeas Corpus with Motion to proceed in forma pauperis and affidavit and one attachment, filed.	
	(copy of order to Counsel for Petr., copy of pet. and order to Resp.)	jfe
Mar. 22	Petitioners petition to be present at hearing, filed. To SOS w/file.	pwm
Mar. 30	Brief of petitioner, filed. To SOS.	mjw
Apr. 1	Order filed denying petitioner's petition to be present at hearing. Copy to petitioner, petitioner's counsel & respondent.	"
Apr. 9	Petr's. letters dated 4/4/71 & 4/6/71 to SOS w/file.	jwe
Apr. 12	brief in behalf of respondent, filed. To SOS.	pwm
Apr. 14	SUBMITTED ON PETITION FOR WRIT OF HABEAS CORPUS.	"
Apr. 16	Petr's. supplement to petition (in letter form), filed. To SOS. (copy to resp.)	jwe
Apr. 20	ORDER denying the petition for writ of habeas corpus, filed.	
	JUDGMENT filed and entered in favor of the respondent and against the petitioner. (Cpy. of order & judgment to counsel)	pwm

Apr.	28	Order to petr's. supplement to petition, filed. Copy to parties.	jwe
		Petr's. notice of appeal from the order of 4/20/71, filed.	"
		Petr's. application for certificate of probable cause for appeal and motion to proceed in forma pauperis, and ORDER allowing petr. to appeal in forma pauperis & issuing a Certificate of Probable Cause, filed. (Copy of notice, application & order to respondent & U. S. Court of Appeals).	"
May	11	Letter of inquiry from Petr., Rec'd. To SOS with file.	jfe
May	18	Letter from Petr. seeking copy of opinion, Rec'd. Answered by SOS 5-20-71.	jfe
Jun.	1	Letter from Petr. seeking advise, Rec'd. Answered by SOS 5-28-71.	jfe
Jun.	2	RECORD ON APPEAL MAILED TO USCA. (Ack)	ple
Jun.	11	Letter from Petr. seeking assistance in filing appendix in U.S.C.A. filed.	jfe
Jun.	30	ORDER trating petition for writ of habeas corpus as an amendment to this action and denying same and directing the Clerk to supplement the record now on appeal with this order and also the amended petition and also a letter from petr. seeking to file an appendix to the record on appeal, filed. Copy to Petr. & D.A. of Fulton County.	
		Amended petition for Writ of habeas corpus, filed.	jfe

ATTEST: A TRUE COPY
CERTIFIED THIS JUN. 30, 1971
Claude L. Goza, Clerk
By: James F. Edmondson, Jr., Deputy Clerk

[Filed in Clerk's Office Mar. 23, 1971]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CHAFFIN, PETITIONER
v.
LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY, RESPONDENT
Case No. 14890

PETITION FOR WRIT OF HABEAS CORPUS

1.

Petitioner is illegally imprisoned and restrained of his liberty by respondent Leroy Stynchcombe, Sheriff of Fulton County, Fulton County, Georgia.

2.

The cause of the imprisonment is that petitioner was retired for the offense of robbery and received a sentence of life imprisonment and the jury was qualified for the death penalty and the trial judge did charge on the law of capital punishment.

3.

That petitioner had received a fifteen year sentence in the first trial, the conviction was affirmed in *Chaffin v. State*, 225 Ga 602, but this Court granted his writ of habeas corpus in *Chaffin v. Stynchcombe*, case no. 13340, Dec. 18, 1969, Judge Sidney Smith.

4.

That petitioner has been in custody ever since his arrest in 1968 on said charges and there is nothing to justify increasing his sentence. *Pearce v. North Carolina*, 395 U.S. 711; See Justice Douglas concurring opinion page 733 and 734, footnote 4 on a review of state cases on increased

sentence; See also *Patton v. North Carolina,* 381 F 2d 636 (4th Circuit).

5.

That to increase his sentence violates petitioner's fourteenth amendment rights of equal protection and due process of law of the United States Constitution; that to increase his sentence without any legitimate reason penalizes petitioner for appealing his first conviction and thereby denies or feters and chills his right of appeal which is a valuable constitutional right. See *Griffin v. Illinois,* 351 U.S. 12; *Douglas v. California,* 372 U.S. 353.

6.

That if a defendant can receive an increase in sentence on re-trial he would be forced to either plead guilty in his second trial or waive his right to a jury trial so that the trial judge would be limited to the sentence given in his first trial, thereby violating petitioner's sixth and fourteenth amendment constitutional rights of the United States Constitution to trial by jury. See *U.S. v. Jackson,* 390 U.S. 570.

7.

That the entire re-trial is void and illegal since the jury was qualified on the death sentence and several jurors were excluded and the State argued the death penalty and the trial judge charged on the law of capital punishment to the jury.

8.

Petitioner denies his guilt and has exhausted his state remedies by appealing to the Georgia Supreme Court (see attached opinion, no. 26214, March 4, 1971.)

9.

Petitioner attached his affidavit and asks that he be permitted to file in forma pauperis as he is indigent

WHEREFORE, petitioner prays that a writ of habeas corpus issue out of this court to Leroy Stynchcombe, Sheriff of Fulton County, respondent, commanding him to bring peti-

tioner before this court at a specific time and place and to answer to the petition and to show cause why petitioner should not be restored to his liberty and he be allowed to file in forma pauperis.

b) That a hearing be held to examine all the records and proceedings in this case and to inquire into the cause of petitioner's detention;

c) That petitioner be restored to his liberty;

d) That petitioner be granted such other and further relief as the Court may deem proper and just.

Respectfully submitted,

/s/ Glenn Zell
GLENN ZELL
Attorney for Petitioner

Suite 822
15 Peachtree St., N.E.
Atlanta, Georgia
524-6878

[Filed in Clerk's Office Mar. 23, 1971]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CHAFFIN

vs.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY

Civil Action Number 14890

This is a petition for a writ of habeas corpus filed by a state prisoner. Petitioner was originally tried and convicted of the offense of robbery by open force and violence, and sentenced to fifteen years imprisonment. The conviction was affirmed. Chaffin v. State, 225 Ga. 602 (1969). This Court granted the prisoner's petition for a writ of habeas corpus. Upon re-trial, he was again convicted, but this time was sentenced to life imprisonment, the length of sentence apparently being set by the jury as prescribed by Georgia law. Again the conviction was affirmed. Chaffin v. The State, —— Ga. ——, (No. 26214, March 4, 1971).

The petitioner has filed this petition, claiming that the re-trial was void and illegal and the present sentence unlawful, because the jury was qualified on the death sentence, the state argued the death penalty, the trial judge charged on the law of capital punishment, and petitioner received a harsher sentence on re-trial, without justification, in violation of the constitutional principles enunciated in North Carolina v. Pearce, 395 U.S. 711 (1969); *see also* Moon v. Maryland, 398 U.S. 319 (1970).

Petitioner having raised this point in a motion for new trial (at the end of the re-trial) and on (his most recent) appeal, it appears that he has exhausted his state remedies. *See* Young v. Alabama, 427 F. 2d 176 (5th Cir. 1970); Williams v. Wainwright, 410 F. 2d 144 (5th Cir. 1969); Hill v. Beto, 390 F. 2d 640 (5th Cir. 1968).

In the Court's view, the holdings in *Pearce* are clearly to the effect that a defendant on re-trial may receive a harsher sentence without violation of his substantive constitutional

rights. However, due process protects the defendant against vindictiveness in the second sentence and imposition of such sentence must be on objective grounds. Where under the Georgia procedure, as here, each sentence is imposed by a separate jury (rather than the Court) on presumably objective information, there does not appear to be room for any vindictiveness on the interplay of the due process principle of *Pearce*. However, the matter is deemed of sufficient importance to allow briefs by both parties.

Accordingly, each party shall, within twenty days of the date this order is filed, file such briefs and argument as are desired. It is requested that the parties address themselves in particular to the issues raised by the fact that in Georgia, the jury sets sentence, insofar as that practice is a factor in the instant case.

Let the same be filed in forma pauperis.

IT IS SO ORDERED.

This the 22nd day of March, 1971.

/s/ Sidney O. Smith, Jr.
SIDNEY O. SMITH, JR.
United States District Judge

[Filed in Clerk's Office Apr. 12, 1971]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CHAFFIN

v.

LEROY STYNCHCOMBE,
SHERIFF OF FULTON COUNTY

Case No. 14890

BRIEF IN BEHALF OF RESPONDENT

In the Georgia Supreme Court, the court held:

> "A careful reading of the opinion of the Supreme Court in that case (North Carolina v. Pearce) reveals that the court answered . . . that imposition of a more severe sentence upon retrial does not violate the equal protection clause of the Fourteenth Amendment in the instant case."
> *Chaffin v. State,* Supreme Court of Georgia, No. 26219.

In *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, the Supreme Court of the United States held, "Neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." But to prevent a "retaliatory motivation" in the resentencing in violation of the Due Process Clause of the Fourteenth Amendment the court stated, "when ever a *judge* imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."

While the court made clear in *Pearce* that "Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial," no procedure could afford the defendant the protection of due process in resentencing better than an impartial jury that was unaware of what sentence had been previously imposed. The jury could not be charged with any retaliatory motivation lacking that knowledge. An

rights. However, due process protects the defendant against vindictiveness in the second sentence and imposition of such sentence must be on objective grounds. Where under the Georgia procedure, as here, each sentence is imposed by a separate jury (rather than the Court) on presumably objective information, there does not appear to be room for any vindictiveness on the interplay of the due process principle of *Pearce*. However, the matter is deemed of sufficient importance to allow briefs by both parties.

Accordingly, each party shall, within twenty days of the date this order is filed, file such briefs and argument as are desired. It is requested that the parties address themselves in particular to the issues raised by the fact that in Georgia, the jury sets sentence, insofar as that practice is a factor in the instant case.

Let the same be filed in forma pauperis.

IT IS SO ORDERED.

This the 22nd day of March, 1971.

/s/ Sidney O. Smith, Jr.
SIDNEY O. SMITH, JR.
United States District Judge

[Filed in Clerk's Office Apr. 12, 1971]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CHAFFIN

v.

LEROY STYNCHCOMBE,
SHERIFF OF FULTON COUNTY

Case No. 14890

BRIEF IN BEHALF OF RESPONDENT

In the Georgia Supreme Court, the court held:

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While the court made clear in *Pearce* that "Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial," no procedure could afford the defendant the protection of due process in resentencing better than an impartial jury that was unaware of what sentence had been previously imposed. The jury could not be charged with any retaliatory motivation lacking that knowledge. An

impartial jury selected to pass upon the issues the first time uniquely fulfills the impartiality element required in due process. *Salisbury v. Grimes,* 223 Ga. 776 (2).

In *Salisbury v. Grimes,* Fifth Circuit, No. 26179, January 14, 1969, a decision involving also a jury question which was later recalled, the Fifth Circuit held, in part:

> "In our view, it would be wholly incongruous and without constitutional foundation to hold that a state is forever bound by and may not increase a jury imposed sentence . . ."

Similarly, a check shows that the majority of the states hold that a jury may increase sentence upon retrial. See *State v. Miller,* 231 So. 2nd 260 (1970, Florida); *Gibson v. The State,* 448 S.W. 2d 481 (Texas); *State v. Sparrow,* 173 S.E. 2d 902 (North Carolina); *Pinkard v. Henderson,* 452 S.W. 2d 908 (Tenn.); *Britt v. The State,* 455 S.W. 2d 625 (Tenn.).

Respectfully submitted,

/s/ Lewis R. Slaton
LEWIS R. SLATON
District Attorney
Atlanta Judicial Circuit

/s/ Tony H. Hight
TONY H. HIGHT
Assistant District Attorney
Atlanta Judicial Circuit

/s/ Joel M. Feldman
JOEL M. FELDMAN
Assistant District Attorney
Atlanta Judicial Circuit

Third Floor
Fulton County Courthouse
Atlanta, Georgia 30303

[Filed in Clerk's Office Apr. 20, 1971]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CHAFFIN vs. LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY	Civil Action Number 14890

This is a petition for a writ of habeas corpus brought by a Georgia prisoner originally convicted of robbery by open force and violence, and sentenced to fifteen years imprisonment. This Court granted petitioner's first petition for a writ of habeas corpus. Upon re-trial, petitioner was again convicted of the same offense, but this time received a sentence of life imprisonment. The sole issue is whether the harsher sentence on re-trial violates the constitutional principles enunciated in *North Carolina v. Pearce,* 395 U.S. 711 (1969), where the length of each sentence was set by a different jury under applicable state law.

The relevant holding in *Pearce* is that while neither the double jeopardy provision nor the Equal Protection Clause of the United States Constitution impose an absolute bar to a harsher sentence upon reconviction, vindictiveness against a defendant for having successfully attacked his first conviction on appeal or in post-conviction proceedings must not affect the new sentence; and since mere fear of such vindictiveness might unconstitutionally deter a defendant from appealing or seeking post-conviction relief from his original conviction, due process requires that he be free of any such fear or apprehension, 395 U.S. at 723-725.

> In order to assure the absence of [vindictiveness], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based on objective information concerning identifiable conduct on the part

> of the defendant occurring after the time of the original proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. (395 U.S. at 726).

Pearce does not, as petitioner argues, require that a prisoner deciding whether to attack his allegedly flawed conviction be absolutely free of the possibility of gaining only a Pyrrhic victory—a flawless new trial but a harsher new sentence. That the prisoner is entitled to such a guarantee of limited punishment was the argument which Justices Douglas and Marshall advanced in their separate opinion, 395 U.S. 726-737, and Justice Harlan stated in his, 395 U.S. at 744-751. But their view was not that of the majority.

The thrust of *Pearce* is that a prisoner deciding whether to attack an initial conviction is entitled to be free from the fear that he will receive a harsher sentence if re-convicted, solely because he chose to challenge the quality of justice he originally received. Ordinarily, where the length of each sentence is set by a different jury, there is no reason for such fear, and the strictures of *Pearce* do not apply. *Britt v. Tollett,* 315 F. Supp. 401 (E.D. Tenn. 1970); *contra Pinkard v. Neil,* 311 F. Supp. 711 (M.D. Tenn. 1970).

Assuredly, it is conceivable that circumstance could be shown indicating that a jury which imposed a harsher sentence upon a defendant's re-conviction was motivated by the vindictiveness described in *Pearce.* But where the sentences are set by different juries, the second ordinarily unaware of the action of the first, there is normally no likelihood that the new sentence will be affected by the motivation to penalize the defendant for exercising his rights to appeal or pursue post-conviction remedies. Therefore, there is no need for applying the restrictions set in Pearce to a new trial in which the jury will set the length of the sentence.

The present record contains no allegation or suggestion that the jury which set the life sentence was in fact moved by a desire to penalize the petitioner for having his first

conviction set aside. Therefore, there is no reason to reach the legal issues, if any, raised by such a showing.

Accordingly, the petition for a writ of habeas corpus is denied.

IT IS SO ORDERED.

This the 19th day of April, 1971.

/s/ Sidney O. Smith, Jr.
SIDNEY O. SMITH, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES CHAFFIN,
PETITIONER-APPELLANT,

VS.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY,
RESPONDENT-APPELLEE.

No. 71-2016

Appeal from the United States District Court for the Northern District of Georgia

(February 8, 1972)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

GEWIN, Circuit Judge: This case brings into focus obliquely the importance and weight to be accorded (a) conceptual abstractions as to crime and punishment, (b) principles which should govern the sound administration of justice in criminal cases, and (c) the societal interest in dealing fairly and effectively with those whose guilt is clearly established after being afforded a second trial following an appeal or postconviction proceeding in which a new trial was sought and granted.[1] We do not discuss these concepts separately or in detail. They underlie our consideration of the case at hand.

James Chaffin was convicted of the offense of robbery by open force and violence in a Georgia state court. In accordance with Georgia law[2] the jury fixed the punish-

[1] See United States v. Tateo, 377 U.S. 463, 12 L.Ed.2d 448 (1964); North Carolina v. Pearce, 395 U.S. 711, 721 n. 18, 23 L.Ed.2d 657, 667 n. 18 (1969).

[2] Ga. Code Ann. § 26-2502:

> Robbery by open force or violence shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment in the penitentiary for life: Provided, however, the jury in all cases may recommend that the defendant be imprisoned in the penitentiary for not less than four years nor longer than 20 years, in the discretion of the court.

ment at 15 years imprisonment. His conviction was affirmed by the Georgia Supreme Court.[3] Thereafter he applied to the United States District Court for a writ of habeas corpus. The district court granted relief and ordered that Chaffin be retried. Upon retrial the jury again found him guilty and recommended mercy. Georgia law mandates that punishment under such a verdict shall be life imprisonment[4] and Chaffin was so sentenced. The Georgia Supreme Court again affirmed his conviction.[5] The record and the assertions of counsel for both parties during oral argument and in their briefs clearly indicate that the second trial was conducted by a different judge, before an entirely new jury, and with a different defense lawyer. A new defense was interposed and additional witnesses were called by both the state and the defense.

After his second trial Chaffin filed a petition for the writ of habeas corpus which was denied by the United States District Court. It is from the district court's order denying relief that Chaffin appeals. The sole issue[6] presented on this appeal is whether the harsher sentence imposed by the jury on retrial violates constitutional principles. We hold that it does not and affirm.

Chaffin urgently contends that an increased sentence constitutes a per se violation of the double jeopardy provisions of the fifth amendment and the equal protection

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[3] Chaffin v. State, 225 Ga. 602, 170 S.E.2d 426 (1969).

[4] See note 2 *supra*.

[5] Chaffin v. State, 225 Ga. 180 S.E.2d 741 (1971).

[6] After oral argument Chaffin, acting pro se, filed several letters with this court apparently seeking to raise a claim of ineffective assistance of counsel. The claim was not presented to the district court and there is nothing in the record to indicate that the state courts have been given the opportunity to consider it.

In addition to the brief filed by his appointed counsel, Chaffin filed a "supplemental brief" which he prepared himself. In his brief Chaffin contends that his original conviction was on a charge of "robbery by hands" and not robbery by force. If this were so the issue would be raised of a conviction upon retrial of an offense greater than that for which he was originally tried. Neither of the preceding contentions were presented either to the district or to the state courts. We therefore do not consider these matters on this appeal. Watkins v. Wilson, 408 F.2d 351 (9th Cir. 1969); *see*, Dryden v. United States, 403 F.2d 1009 (5th Cir. 1968). *See also* Jones v. Vineyard, 438 F.2d 1231 (5th Cir. 1971).

and due process clauses of the fourteenth amendment.[7] We begin by noting that the United States Supreme Court over 50 years ago in *Stroud* v. *United States*[8] held there was no per se constitutional prohibition against imposing an increased sentence upon retrial.

More recently in *North Carolina* v. *Pearce*[9] the Court explicitly rejected double jeopardy and equal protection principles as grounds for precluding a harsher sentence upon retrial.[10] The Court did, however, recognize a narrow circumstance in which due process may bar an increase in

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[7] Chaffin also suggests that if a jury is permitted to increase the sentence on a retrial a defendant would be forced either to waive a jury trial in the second trial or to plead guilty so that the trial judge could not increase the sentence. He claims this to be a violation of his sixth amendment right to a jury trial. There is no merit to this claim. The jury might decrease his sentence and the trial judge, giving full consideration to the principles set forth in North Caroline v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656 (1969), might increase it. Furthermore, in Brady v. United States, 397 U.S. 742, 25 L.Ed.2d 747 (1970), the Supreme Court rejected what we consider to be a substantially similar argument. In *Brady* it was argued that the threat of a more severe punishment if the defendant chose to be tried by a jury coerced him to plead guilty in violation of the Fifth Amendment. The Court held that to be a constitutionally permissible dilemma.

[8] 251 U.S. 15, 64 L.Ed. 103 (1919).

[9] 395 U.S. 711, 23 L.Ed.2d 656 (1969). The Court's most recent decision on the question of increased sentences is of no assistance in the case sub judice. In North Carolina v. Rice, —— U.S. ——, 30 L.Ed.2d —— (1971) [No. 70-77, Dec. 14, 1971] the Court had before it the question whether *Pearce* applied to an increased sentence imposed upon a trial de novo in a North Carolina Superior Court after an intial trial in a lower court. The Fourth Circuit held that *Pearce* was applicable since it required that reasons be given if a sentence is increased and in *Rice* the record revealed nothing which warranted an increased sentence. Although the defendant had been discharged from prison before the case reached the court of appeals, the Fourth Circuit rejected the state's claim of mootness since according to the court there were certain rights and privileges to be regained by having a conviction expunged. The Supreme Court refused to decide the case on the merits. The Court pointed out that Pearce requires only resentencing and did not *ipso facto* require that the conviction be set aside. Thus, since there was no evidence whether Rice would reap any benefits merely from a reduction in a sentence already served, the Court vacated the judgment of the court of appeals and remanded the case to that court for reconsideration of the question of mootness.

[10] We hold, therefore that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction.

395 U.S., at 723, 23 L.Ed.2d at 668.

sentence. In *Pearce* upon retrial following an appeal the trial judge had increased the sentence which he had imposed after the first trial. The Supreme Court found no reasons or justifications in the record for the increased sentence. In such a case the Court said there is a possibility of vindictiveness on the part of the sentencing judge, and that such vindictiveness might "unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction." [11] The Court held that due process requires that a defendant be freed of the apprehension of a retaliatory motive on the part of the trial judge. To ensure due process the Court established the requirement that "whenever a *judge* imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." [12] As a further requirement the Court added that the reasons must be based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time time of the original proceeding." [13]

The Court was concerned with the elimination of the possibility of vindictiveness as a threat to a defendant weighing the merits and the advisability of seeking post conviction relief. There was no denunciation of increased sentences as such. *Moon* v. *Maryland*,[14] where the writ of certiorari was dismissed as being improvidently granted, strengthens this interpretation of *Pearce*. In *Moon* the Court granted the writ to consider the retroactivity of *Pearce*. Subsequently, the sentencing judge in the second trial filed an affidavit setting forth valid reasons for the increased sentence. But more importantly the Court found conclusively that vindictiveness played no part in the imposition of an increased sentence. In dismissing the writ, the Court said:

> But the dispositive development is that counsel for the petitioner has now made clear that there is no claim

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[11] *Id.* at 725, 23 L.Ed.2d at 669.

[12] *Id.* at 726, 23 L.Ed.2d at 670 (emphasis added); *accord*, Henderson v. United States, 446 F.2d 557 (5th Cir. 1971).

[13] 395 U.S. at 726, 23 L.Ed.2d at 670; accord, Barnes v. United States, 419 F.2d 753 (D.C. Cir. 1969).

[14] 398 U.S. 319, 26 L.Ed. 262 (1970).

in this case that the due process standard of Pearce was violated. As counsel forthrightly stated in the course of oral argument, "I have never contended that Judge Pugh was vindictive." [15]

As the district court recognized it is possible to conceive of circumstances where a jury might impose a harsher sentence upon retrial motivated by the type of vindictiveness denounced in *Pearce*. But a jury will normally be unaware of the prior trial, much less the sentence. Under the facts and circumstances presented in this case the likelihood of vindictiveness is so remote that we feel the burden must be upon the defendant to show that the jury acted out of vindictiveness in imposing an increased sentence. We have carefully studied the record and briefs in this case and find no evidence of vindictiveness.[16] There is nothing to suggest that the jury which sentenced Chaffin to life imprisonment did so because of a desire to punish him for appealing his case.[17]

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[15] *Id.* at 320, 26 L.Ed. at 264.

[16] In Kansas City v. Henderson, 468 S.W.2d 48 (Mo. Sup. Ct. 1971) the Missouri Supreme Court, in dealing with the principles enunciated in *Pearce* stated:

> Such considerations cannot possibly be applicable in a case wherein the punishment is assessed by the jury at the time it determines guilt at the second trial. It is not permissible for that jury to even be informed that the defendant was convicted previously on the same charge, and necessarily it may not be informed as to what sentence was received at the prior trial. It would constitute reversible error to introduce such testimony before the jury. Furthermore, such a jury in a one-step trial would not have before it evidence of things occurring between the first and second trial or other evidence relative to whether there ought to be greater punishment than that imposed at the first trial. These things would not be competent evidence for a jury determining guilt of the offense charged. Consequently, the jury in the second trial exercises its judgment as to the punishment to assess solely upon the evidence introduced at the second trial and the court's instructions. Necessarily, it does not in any way measure that punishment by what was done at the first trial. The punishment imposed by the jury in the second trial cannot be for the purpose of imposing a heavier sentence and thereby punishing the defendant for having been successful in getting his original conviction set aside.

468 S.W.2d at 52-53.

[17] In his supplemental brief on appeal Chaffin does attempt to show vindictiveness by listing other defendants who have received lesser sentences than he for robbery convictions in the same state court. These statistics are not veri-

We are not unmindful of the fact that the Fourth Circuit in *Levin v. Peyton*[18] had held *Pearce* to apply to jury sentencing. That circuit concluded that the Supreme Court in *Pearce* was concerned "that a defendant be freed of the apprehension of a harsher sentence after retrial," and upon that basis decided that jury sentencing does not provide the requisite freedom. While the *Pearce* court was concerned with the apprehensions of the defendant, we think it limited its concern to fears of a retaliatory motivation. The Fourth Circuit has, in our view, extended *Pearce* beyond the rationale upon which it was decided.

We note in conclusion that the result we now reach is in accord with this court's decision in *Salisbury v. Grimes,*[19] a pre-*Pearce* case. In *Salisbury* the court held that the imposition of a greater sentence by a Georgia jury upon retrial violated no constitutional principles.

> In our view it would be wholly incongruous and without Constitutional foundation, to hold that a state is forever bound by and may not increase a jury imposed sentence but that the defendant may nevertheless shoot for its reduction with a guarantee in advance that the next jury cannot increase the penalty, although acting on the evidence it has heard and entirely free of any knowledge from which it might impose punishment for taking the appeal.[20]

We find no conflict between the *Salisbury* rationale and that set forth in *Pearce.* Various state courts and at least

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fied and even if they were, we think they are of no help to Chaffin. The mere fact of variances in length of sentences awarded separate defendants in unrelated trials is no indication of vindictiveness. *Cf.* Howard v. Fleming, 191 U.S. 126, 48 L.Ed. 121 (1903); Earin v. Beto, —— F.2d —— (5th Cir. 1971) [No. 71-2824, Jan. 3, 1972].

[18] Levine v. Peyton, 444 F.2d 525 (4th Cir. 1971), *cert. denied* 40 U.S.L.W. 3275 (U.S. Dec. 14, 1971); *accord,* Pinkard v. Neil, 311 F. Supp. 711 (M.D. Tenn. 1970).

[19] 406 F.2d 50 (5th Cir. 1969). Due to subsequent developments the case was remanded with instructions to dismiss as moot in an unreported en banc order dated October 8, 1970.

[20] *Id.* at 52.

one federal district court are in accord[21] with our conclusion.

Judgment AFFIRMED.

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[21] Britt v. Tollett, 315 F. Supp. 401 (E.D. Tenn. 1970); State v. Miller, 231 So.2d 260 (Dist. Co. App. Fla. 1970); Salisbury v. Grimes, 223 Ga. 775, 158 S.E.2d 412 (1967); Bruce v. Commonwealth, 465 S.W.2d 60 (Ky. Ct. App. 1971); Kansas City v. Henderson, 468 S.W.2d 48 (Mo. 1971); Branch v. State, 445 S.W.2d 756 (Tex. Crim. App. 1969) (on rehearing).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2016

JAMES CHAFFIN, PETITIONER-APPELLANT,

versus

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY, RESPONDENT-APPELLEE.

D. C. Docket No. CA 14890

Appeal from the United States District Court for the Northern District of Georgia

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued As Mandate: MAR. 8, 1972

FEBRUARY 8, 1972

[Filed Feb. 29, 1972. Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES CHAFFIN, PETITIONER-APPELLANT,

versus

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY, RESPONDENT-APPELLEE.

No. 71-2016

Appeal from the United States District Court for the Northern District of Georgia

(February 29, 1972)

ON PETITION FOR REHEARING

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

SUPREME COURT OF THE UNITED STATES
October Term, 194..

JAMES CHAFFIN, PETITIONER,

v.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY

No. 71-6732

On petition for writ of Certiorari to the United States ..... Court of Appeals for the Fifth ..... Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

OCTOBER 16, 1972

☆ U.S. Government Printing Office: 1972—489-597/330

DEC 13 1972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6732

JAMES CHAFFIN,

Petitioner,

v.

LEROY STYNCHCOMBE, SHERIFF
OF FULTON COUNTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

GLENN ZELL
15 Peachtree Street, N.E.
Atlanta, Georgia 30303
Attorney for Petitioner

Washington, D.C. • THIEL PRESS • (202) 393-0625

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6732

JAMES CHAFFIN,

Petitioner,

v.

LEROY STYNCHCOMBE, SHERIFF
OF FULTON COUNTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 455 F.2d 640 (1972). The Petition for Re-Hearing is reported in the opinion.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its judgment on February 8, 1972. (App. 14) The motion for re-hearing was denied on February 29, 1972. (App. 22) The order and mandate was entered on March 8, 1972 (App. 21), and the petition for certiorari was filed on May 26, 1972. The jurisdiction of the Court rests on 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution of the United States provides in part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The Fourteenth Amendment of the Constitution of the United States provides in part:

> ". . . nor shall any State deprive any person life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Georgia Code Annotated, §26-2501 provides:

> "Robbery is the wrongful, fraudulent, and violent taking of money, goods, or chattels from the person of another by force or intimidation, without the consent of the owner, or the sudden snatching, taking or carrying away any money, goods, chattels, or anything of value from the owner or person in possession or control thereof without the consent of the owner or person in possession or control thereof."

Georgia Code Annotated, §26-2502 provides:

"Robbery by open force or violence shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment in the penitentiary for life; Provided, however, the jury in all cases may recommend that the defendant be imprisoned in the penitentiary for not less than four years nor longer than 20 years, in the discretion of the court."

Georgia Code Annotated, §26-301 provides:

"Persons who are considered of sound mind—A person shall be considered of sound mind who is neither an idiot, a lunatic, nor afflicted with insanity, and who has arrived at the age of 14 years, or before that age if such person know the distinction between good and evil."

QUESTION PRESENTED

Does the increasing of petitioner's sentence from fifteen (15) years in his first jury trial to life imprisonment on his re-trial after the accused exercised his unfettered and absolute right of appeal violate the double jeopardy provisions of the Fifth Amendment and the equal protection clause and due process clause of the Fourteenth Amendment of the United States Constitution where a different jury imposed the increased sentence and there were no special grounds set forth for the increase?

STATEMENT OF THE CASE

On January 21, 1969, James Chaffin was tried in the Fulton Superior Court, Atlanta, Georgia, upon his plea of not guilty to the charge of robbery by open force and violence in violation of Georgia Code Annotated, Section

26-2501. The jury found Chaffin guilty, and set the sentence at fifteen (15) years. The conviction and sentence was affirmed by the Georgia Supreme Court. *Chaffin v. State*, 170 S.E.2d 426 (Ga. 1969).

Thereafter he filed a writ of habeas corpus in the United States District Court, Northern District of Georgia, Atlanta Division. The District Court granted the writ on the grounds that the trial court erroneously placed the burden of proving alibi on the defendant. See *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1972).

Upon retrial for the same charge, but before a different jury, a sentence of life imprisonment was imposed by the jury. The Georgia Supreme Court affirmed the imposition of a greater sentence on retrial without requiring special grounds to justify the increased sentence. *Chaffin v. State*, 180 S.E.2d 741 (Ga. 1971).

Thereafter Chaffin again filed a writ of habeas corpus in the United States District Court alleging that the increased sentence violated his constitutional rights. (App. 4) The writ was denied (App. 11) and the Fifth Circuit affirmed, holding that the imposition of a harsher sentence by a jury on retrial did not violate Constitutional principles since the second jury did not know petitioner's previous sentence.[1]

The records of the two trials are not part of the record in this case. However, the Court of Appeals opinion (App. 15) holds that the second trial was substantially different from the first trial. This is incorrect. The defense of alibi was interposed at both trials. The evidence was exactly the same in proving the guilt of the petitioner in both trials. In the second trial, defense counsel raised the defense of insanity. Under Georgia law

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[1] *Chaffin v. Stynchcombe*, 455 F.2d 640; see also *Casias v. Beto*, 333 F. Supp. 214 (N.D. Texas 1971), affirmed 459 F.2d 54 (1972).

this affirmative defense does not deny the crime, but raises the question whether the accused had the mental capacity to distinguish between right and wrong. See Georgia Code Annotated, §26-301; *Handspike v. State*, 45 S.E.2d 662 (Ga. 1947).

ARGUMENT

The increasing of petitioner's sentence from fifteen (15) years in his first jury trial to life imprisonment on his retrial after the petitioner exercised his unfettered and absolute right of appeal violates the double jeopardy provisions of the Fifth Amendment and the equal protection clause and due process clause of the Fourteenth Amendment of the United States Constitution even where a different jury imposed the increased sentence and there were no special grounds set forth for the increase.

A. GEORGIA EXTRACTS A UNCONSTITUTIONAL PRICE WHEN THE ACCUSED EXERCISES HIS RIGHT TO APPEAL FROM THE ERRORS OF THE TRIAL COURT.

In *Salisbury v. Grimes*, 158 S.E.2d 412 (Ga. 1967), the Georgia Supreme Court held that the imposition of a greater sentence on retrial did not violate any constitutional right. The Court reasoned that since the accused asked for a new trial by his own choosing and then secured a new trial, the slate is wiped clean and a harsher sentence may be imposed. Subsequently, in *North Carolina v. Pearce*, 395 U.S. 711 (1969), it was held that a judge may not increase the sentence on retrial unless special grounds are set forth justifying the increase. The Georgia Supreme Court in *Chaffin v. State*, 180 S.E.2d 741 (Ga. 1971), was presented with the *Pearce*

case but held that since juries set the sentence in Georgia, there can be no vindictiveness in imposing a harsher sentence and therefore *Pearce* did not apply. See also *Rozier v. State*, ___ S.E.2d ___, 126 Ga. App. 336 (Ga. 1972).

There are six other states that permit juries to impose sentence, and all in accord with the Georgia Supreme Court.[2]

The Fourth Circuit[3] and three Federal District Court decisions in Tennessee[4] are in conflict with the Fifth Circuit.

These state courts seem to ignore the right of an accused to appeal his case to correct legal errors in his trial. They all point to the fact that the jury in the second trial does not know the sentence imposed in the first trial, and therefore there is no vindictiveness as was present in *North Carolina v. Pearce, supra.*

But this forces the defendant to stand pat with a short sentence, but with an error ridden trial. If he takes the choice of securing a new trial, he is faced with the threat of getting a greater sentence.

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[2] *Bruce v. Commonwealth*, 465 S.W.2d 60 (Ky. 1971); *Spidle v. State*, 446 S.W.2d 793 (Mo. 1969); *State v. Martin*, 497 P.2d 427 (Okla. 1972); *Brown v. State*, 466 S.W.2d 527 (Tenn. 1971); *Fuery v. State*, 464 S.W.2d 666 (Texas 1971); *Levin v. Payton*, 444 F.2d 525 (4th Cir. 1971) cert. denied, *Slayton v. Levine*, 404 U.S. 995 (1970) reversing a Virginia conviction which allowed an increased sentence on retrial.

[3] *Levin v. Payton* supra; *May v. Payton*, 398 F.2d 476 (4th Cir. 1970), cert. denied *Cox v. May*, 402 U.S. 948 (1971).

[4] *Pinkard v. Neil*, 311 F. Supp. 711 (M.D. Tenn., 1970); *Britt v. Tollett*, 329 F. Supp. 568 reversing *Britt v. Tollett*, 315 F. Supp. 401 (E.D. Tenn. 1971); *Pendergrass v. Neil*, 338 F. Supp. 1198 (M.D. Tenn. 1972).

Therefore one seeking to safeguard his Constitutional rights in Georgia may pay a very expensive price when he appeals his conviction.

B. *NORTH CAROLINA V. PEARCE* IS FULLY APPLICABLE

The imposition upon Chaffin of a harsher sentence after retrial for the same offense was a clear violation of the holding in *North Carolina v. Pearce*, 395 U.S. 711 (1969). The issue presented in *Pearce*, as stated by this Court, is exactly the same as the issue in the instant case:

> "When at the behest of the defendant, a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?" 395 U.S. at 713.

This Court answered the above question by stating:

> "[S]ince the fear of . . . vindictiveness may constitutionally deter a defendant's exercise of the tiring to appeal or collaterally attack his first conviction, due process . . . requires that a defendant be freed of apprehension of such a retaliatory motivation." 395 U.S. at 725.

It seems that the Court was concerned with the discouraging effects of the accused's reasonable fears and apprehensions of a harsher sentence. Accordingly this Court made the trial judge state reasons based on objective information why an increased sentence was imposed on retrial. 395 U.S. at 725.

To affirm what the State has done to petitioner would be to discourage appeals through the implicit threat of the jury imposing a harsher sentence. If the *Pearce* decision does not apply to the instant case, since a jury imposed the sentence rather than a judge, then the

Constitutional right of appeal means much less in the seven states where a jury sets the sentence than in the remaining forty three states and the federal courts where the judge sets the sentence.

C. DUE PROCESS AND EQUAL PROTECTION PROHIBITS THE CHILLING OF THE RIGHT TO APPEAL BY THE THREAT OF AN INCREASED SENTENCE UPON RETRIAL.

Before reaching the constitutional arguments, a thought should be given to why the State is interested in having the right to increase the sentence on retrial absent any special grounds. The reason would seem to be that prosecutors or the State conceive of justice as being served only by the imposition of maximum sentences. If that were true, legislatures would not make provision for variable penalties and conscientious prosecutors would neither engage in plea bargaining or even recommend lesser penalties to judges or juries. But law can be maintained as the source of social and economic order without securing maximum penalties in all or even a substantial portion of cases. Therefore there is no public policy that would justify giving the State the right to increase the penalty on a retrial.

Turning to the due process argument, it is obvious that a threat of an increased sentence chills the Constititional right of appeal.

This Court has held that once avenues of appellate review are established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois,* (351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Draper v. Washington*, 372 U.S. 487 (1963); *Rinaldi v. Yeoger*, 384

U.S. 305 (1966); *Eskridge v. Washington State Board*, 357 U.S. 214 (1958); *Williams v. Oklahoma City*, 395 U.S. 458 (1969). If a defendant receives the maximum sentence or near the maximum, he would appeal since he would have very little or nothing to lose. But a defendant who receives a minimum sentence or a sentence close to the minimum would not appeal since the chances of an increased sentence on retrial, if found guilty, would be greater. The right of appeal would really depend on whether the accused was willing to play "Russian Roulette" with his freedom. An appeal then becomes a game of chance.

This is like the "grisly choice" discountenanced in *Fay v. Noia*, 372 U.S. 391 (1963). "The law should not and in our judgment does not, place the defendant in such an incredible 'dilema' ". *Green v. United States*, 355 U.S. 184 (1958).

The only Supreme Court case dealing with increasing punishment by a jury is *Stroud v. United States*, 251 U.S. 15 (1919). In *Stroud* the defendant received a life sentence for first degree murder, and after securing a reversal was retried and sentenced to death. This court affirmed. *United States v. Ball*, 163 U.S. 662 (1896), would also seem to indicate that once the slate is wiped open, there is no bar to the imposition of a sentence greater than that originally imposed.

This Court's decision in *Furnam v. Georgia*, 408 U.S. 238 (1972) may bar the death penalty, but the principle in *Stroud* has never been overturned. Now is the time to give the *Stroud* decision its proper burial, and hold that a State may not seek a greater sentence on retrial even where the jury sets the sentence.

Four states do not allow the death sentence on retrial where the accused received a life sentence at his first trial. *People v. Henderson*, 386 P.2d 677 (Cal. 1963);

Roberson v. The State, 258 So.2d 257 (Fla. 1971); *State v. Hatten*, 188 N.W.2d 846 (Neb. 1972); *State v. Wolf*, 216 A.2d 586 (N.J. 1966). Cf. *State v. Kneeskern*, 210 N.W. 465 (Iowa 1926); *State v. Morgan*, 82 So. 711 (La. 1919); *Commonwealth v. Arsenault, Jr.*, 280 N.E.2d 129 (Mass. 1972).

In *Jackson v. United States*, 390 U.S. 570, 581 (1968), it is stated:

> "Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than *to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it would be patently unconstitutional*."

The threat inherent in the exercise of such a punitive policy in *Jackson* is substantially the very same threat inherent in the exercise of such a punitive policy in the instant case.

This punitive policy is similar to coercing a guilty plea. See *Herman v. Claudy*, 350 U.S. 16 (1954).

In *Lawrence v. Henderson*, 318 F.Supp. 230 (E.D. Louisiana, 1970) the Court found that a verbal threat by the prosecutor that he would try the accused on a multiple bill so the accused would be facing thirty (30) years rather than twelve (12) years if he was successful on his appeal caused the accused to withdraw his appeal. The Court then concluded that the defendant was denied his Constitutional right of appeal because of the threat.

Under the facts of the present case, there is a continuing threat by the prosecutor that if the accused is successful on appeal the State will go for an increased sentence.

The only difference between Georgia's policy of increased sentence on retrial and *Lawrence v. Henderson*, supra, is that the threat in the former is implied while the threat in the latter is expressed.

D. INCREASING THE PENALTY ON RETRIAL VIOLATES THE PROHIBITION AGAINST DOUBLE JEOPARDY.

In *North Carolina v. Pearce*, 395 U.S. 711, the Court rejected the assertion that the Fourteenth Amendment due process protection from double jeopardy protects against increased penalty at the retrial. The Court relied on a line of cases, commencing with *United States v. Ball*, 163 U.S. 662 and *Stroud v. United States*, 251 U.S. 15, in which the Court had previously rejected the double joepardy protection as a barrier either to retrial of a defendant whose conviction was set aside due to error, or to imposition of a greater penalty on the second trial. 395 U.S. at 720-21. Justices Douglas, Harlan and Marshall would have found the double jeopardy protection violated in *Pearce*. 395 U.S. at 727, 745. Even if double jeopardy was not a proper barrier to an increased penalty in *Pearce*, it is such a barrier here. In the instant case, the second trial is an exposure to jeopardy forced upon the defendant as the price for securing a new trial.

To allow the punishment from the first trial to be enhanced at the second trial is to penalize the defendant for the state's failure to provide an initial fair trial. But, the concept of the double joepardy safeguard encompasses protecting a defendant from the state receiving two bites at the apple. *Downum v. United States*, 372 U.S. 734, 736 (1963); *Green v. United States*, 355 U.S.

184, 190 (1958); *Benton v. Maryland,* 395 U.S. 784, 796-97 (1969). Hence the double jeopardy clause bars increased penalties upon retrial.

Moreover, the line of reasoning pursued by Mr. Justice Harlan in Pearce is fully applicable in the present situation respecting double jeopardy. In his separate opinion in *Pearce,* Mr. Justice Harlan noted that the double jeopardy rule was recognized in *Green v. United States,* 355 U.S. 184, to bar retrying a defendant on remand for a greater offense than the highest offense for which he was convicted at the first trial. Applying the reasoning of *Green,* Mr. Justice Harlan pointed out that the merits for protecting against jeopardy for a harsher offense on retrial are equally applicable respecting the imposition of a harsher penalty on retrial. 395 U.S. at 746. Further, as Mr. Justice Harlan stated: "It cannot be that the [double jeopardy] provision does not comprehend 'sentences'—as distinguished from 'offenses'—for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one." 395 U.S. at 747.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit be vacated and the case remanded

for a new trial as to sentence only. See *Johnson v. Smith*, 182 S.E.2d 101 (Ga. 1971); *Horton v. State*, 187 S.E.2d 677 (Ga. 1972).

Respectfully submitted,

GLENN ZELL
Suite 822
15 Peachtree Street, N.E.
Atlanta, Georgia 30303
524-6878

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Glenn Zell, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Brief of Petitioner on Respondent by depositing copies of the same in a United States mail box, with first class postage prepaid, addressed to counsel of record at their post office addresses:

Joel Feldman
Assistant District Attorney of Fulton County
Fulton County Courthouse
Atlanta, Georgia 30303

Dorothy T. Beasley
Assistant Attorney General of the State of Georgia
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This __ day of December, 1972.

GLENN ZELL

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B. Where the issues of retaliatory motivation or vindictiveness are absent, no constitutional infirmity surrounds a harsher sentence on retrial; particularly where the increased sentence fixed by a different jury with no knowledge of the defendant's former trial; and judgment is entered on the new sentence by a different judge than the judge initially imposing sentence, and where a new separate defense is interposed by a new defense counsel, which defense is not inconsistent with guilt, and where new, different witnesses for the prosecution and the defense appear and testify 7

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6732

JAMES CHAFFIN,

Petitioner,

v.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

PART ONE

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 455 F.2d 640 (1972). The Petition for Re-Hearing is reported in the opinion.

JURISDICTION

Jurisdiction is conceded.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondent concedes that the Constitutional Provisions and the Statutes Involved, as set out in the Petitioner's Brief are the legal provisions to be applied to the case *sub judice*.

In addition Respondent would add the following Georgia Statutes as also being involved in the case:

Georgia Code 27-2501. Punishment; recommendation of the jury, provides:

"All felonies, except treason, insurrection, murder, (robbery by force?), manslaughter, assault with intent to rape, rape, sodomy, foeticide, mayhem, seduction, arson, burning railroad bridges, trail-wrecking, destroying, injuring, or obstructing railroads, perjury, false swearing, and subornation or perjury or false swearing, shall be punished by imprisonment and labor in the penitentiary for the terms set forth in the several sections in this Code prescribing the punishment of such offenses; but on the recommendation of the jury trying the case, when such recommendation is approved by the judge presiding on the trial, said crimes shall be punished as misdemeanors. If the judge trying the case sees proper, he may, in fixing the punishment, reduce such felonies to misdemeanors."

Georgia Code 27-2502. Determinate sentences for felonies not punishable by life imprisonment, provides:

"The jury in their verdict on the trial of all cases of felonies not punishable by life imprisonment shall not

prescribe an indeterminate sentence for a minimum and maximum term, but shall prescribe a determinate sentence for a specific number of years, which shall be within the minimum and maximum prescribed by law as the punishment for said crime, and the judge in imposing the sentence shall sentence said convicted person to the penitentiary in accordance with the verdict of the jury. However, the judge imposing said sentence is hereby granted power and authority to suspend or probate said sentence, under such rules and regulations as he thinks proper. The judge is also empowered with the right and authority to revoke said suspension or probation when the defendant has violated any of the rules and regulations prescribed by the court. In cases of pleas of guilty, the judge, and not the jury, shall prescribe a degerminate sentence for such specific number of years as he may see fit: Provided, that after the term of court at which sentence is imposed the superior court judges shall have no authority to suspend, probate, modify or change the sentences of said prisoners except as otherwise provided."

Georgia Code 27-2709. Same; jurisdiction of courts; procedure; hearings; reference to circuit probation officer; period of probation; disposition of prisoner pending hearing; payment of fines or costs as condition precedent to probation, provides:

"Any court of this State which has original jurisdiction of criminal actions, except juvenile courts, municipal courts and courts of ordinary where the defendant in a criminal case has been found guilty upon verdict or plea, or who has been sentenced upon a plea of nolo contendere, except for an of-

fense punishable by death or life imprisonment, may, at a time to be determined by the court, hear and determine the question of the probation of such defendant. . ."

QUESTION PRESENTED

Respondent takes issue with the "Question Presented" as set out in the Petitioner's Brief. Respondent has, accordingly, restated the same as follows:

1. Does the Fifth Amendment, as incorporated into the Fourteenth Amendment, absolutely prohibit a Defendant from receiving, on retrial, a sentence greater than one he received in a former trial which former conviction was reversed on appeal; and

2. Conceding that said Amendment is not an absolute bar to an increased sentence on retrial, can vindictive reasons for the increased sentence be presumed absent when the second trial is conducted before a different judge and a different jury (which jury cannot legally be informed by the Prosecution of the results of the former trial) with a different defense attorney and different defense.

STATEMENT OF THE CASE

The first two paragraphs of Petitioner's "Statement of The Case" are correct. Thereafter we take issue with said "Statement of The Case," and submit our own.

THE CASE

After the U. S. District Court granted the Petitioner's application for Writ of Habeas Corpus, and ordered a new trial, the Petitioner was returned to Fulton County, Georgia for retrial.

He was put on trial before a different judge and different jury (which jury had no knowledge of the Petitioner's previous trial and conviction, nor did such jury have knowledge of the sentence imposed in the first trial. Additionally, different prosecution and defense witnesses were called and testified at the new trial). The Appellant was also represented by different defense counsel, who interposed a different defense than that previously relied upon. (At his first trial the Petitioner relied exclusively on the defense of alibi. At his second trial the Petitioner continued to rely on the defense of alibi, but he also added a second inconsistent defense—insanity. To summarize his defenses he avers "I am not guilty of the crime because I was not there; but even if I was there and committed the offense, I am still not subject to punishment because I was insane when I committed the crime." See *Chaffin v. State*, 227 Ga. 327, 328, (2) (1971), 180 S.E.2d 741 (1971).

After finding him guilty for a second time the jury fixed the Petitioner's sentence at life imprisonment, and said sentence was made the judgment of the Court. On appeal the second judgment and conviction were affirmed. *Chaffin v. State, id.*

Thereafter Petitioner filed a second application in the District Court for Writ of Habeas Corpus, (A-4,5,6,7), which Court denied the same. A-11, 12, 13. The District Court's decision was appealed to the Fifth Circuit Court

of Appeals, which Court affirmed the District Court. A-14-22. *Chaffin v. Stynchcombe*, 455 F.2d 640 (5th Cir., 1972). Both Courts rejected Petitioner's contention to the effect that the Fifth Amendment's Prohibition against double jeopardy, and the Fourteenth Amendment's Clauses requiring due process of law and prohibiting a denial of equal protection of the law, as construed in *North Carolina v. Pearce*, 395 U.S. 711, were an absolute bar to an increased sentence on retrial. What is prohibited, the Courts' stated in construing *Pearce*, was an increased sentence based on a retaliatory motivation or vindictiveness alone.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. THERE IS NOT CONSTITUTIONAL PROHIBITION AGAINST A DEFENDANT RECEIVING A HARSHER SENTENCE ON A RETRIAL THAN THAT RECEIVED IN A FORMER TRIAL.

The Petitioner contends that the Fifth Amendment Prohibition against double jeopardy, and the due process and equal protection clauses of the Fourteenth Amendment constitute an absolute bar to increasing a defendant's sentence upon his conviction on retrial, he, having successfully had his former conviction set aside. The issue thus raised has been settled by this Court adversely to such a contention in *Straud v. United States*, 251 U.S. 15, 64 L.Ed. 103, ___ S.Ct. ___ (1919); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, ___ L.Ed.2d ___ (1969); *Colten v. Kentucky*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 40 U.S. Law Week 4703 (June 12, 1972).

There is, accordingly, no absolute constitutional prohibition against increasing a sentence on retrial from that affixed at a former trial. The only question thus presented is "To what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?" *North Carolina v. Pearce,* 395 U.S. @ 275.

B. WHERE THE ISSUES OF RETALIATORY MOTIVATION OR VINDICTIVENESS ARE ABSENT, NO CONSTITUTIONAL INFIRMITY SURROUNDS A HARSHER SENTENCE ON RETRIAL; PARTICULARLY WHERE THE INCREASED SENTENCE FIXED BY A DIFFERENT JURY WITH NO KNOWLEDGE OF THE DEFENDANT'S FORMER TRIAL; AND JUDGMENT IS ENTERED ON THE NEW SENTENCE BY A DIFFERENT JUDGE THAN THE JUDGE INITIALLY IMPOSING SENTENCE, AND WHERE A NEW SEPARATE DEFENSE IS INTERPOSED BY A NEW DEFENSE COUNSEL, WHICH DEFENSE IS NOT INCONSISTENT WITH GUILT, AND WHERE NEW, DIFFERENT WITNESSES FOR THE PROSECUTION AND THE DEFENSE APPEAR AND TESTIFY.

In Georgia, except where a jury trial is waived, the jury trying the case fixes the sentence to be imposed on a convicted defendant. See Georgia Code Sections 27-2501, 27-2502, and former Code Sections 26-2501 and 26-2502. Where the imprisonment is for a term of years the trial judge is granted the authority to suspend or probate any part or all of the sentence fixed by the jury. His power to suspend or probate such sentences does not, however,

extend to those cases in which a punishment of life imprisonment, is prescribed. See Georgia Code Sections 27-2502, 27-2709.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969) this Court stated:

> "In order to assure the absence of [vindictiveness], we have concluded that whenever a *judge* imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

Id. at 726, emphasis added, as quoted in *Chaffin v. Stynchcombe*, 455 F.2d @ 642, and the unreported District Court decision A-11-12.

In applying this test to the Georgia procedure utilized in the case *sub judice* the District Court and the Fifth Circuit Court of Appeals observed that it is possible to conceive of circumstances where a jury might impose harsher sentence upon retrial for vindictive reasons. "But a jury will normally be unaware of the prior trial, much less the sentence. Under the facts and circumstances of this case the likelihood of vindictiveness is so remote that . . . [said Court] feels the burden must be upon the defendant to show that the jury acted out of vindictiveness in imposing the increased sentence." *Id.* at 643. The

Court then observed that there was no issue of vindictiveness present either in the record or the briefs.

As was stated by said Court in a pre *Pearce* case:

> "In our view it would be wholly incongruous and without constitutional foundation, to hold that a state is forever bound by and may not increase a jury imposed sentence but that the defendant may never the less shoot for its reduction with a guarantee in advance that the next jury cannot increase the penalty, although acting on the evidence it has heard and entirely free of any knowledge from which it might impose punishment for taking the appeal."

Salisbury v. Grimes, 406 F.2d 50 (5th Cir., 1969), remanded with instructions to dismiss as moot in an unreported en banc order dated October 8, 1970.

As previously mentioned no contention has been made or suggested that the second jury had any knowledge of the Petitioner's former conviction or the sentence imposed as a result of said conviction, nor could the record or briefs lend support to such a contention, if made. In short, it is impossible to conclude that the second jury fixed a harsher sentence on the Petitioner based on a retaliatory motivation or vindictiveness as a result of the defendant's having successfully had his first conviction set aside on appeal, since the second jury had no knowledge of the former trial, conviction and sentence. Compare *Kansas City v. Henderson,* 468 S.W.2d 48 (Mo. Sup. Ct. 1971).

Additionally, the record of the second trial, in any event, is sufficiently different from the first trial to justify the imposition of the harsher sentence. In the first trial the Petitioner relied on the defense of alibi. Such a de-

fense does not deny (or admit) that the crime occurred but that the Petitioner was not the guilty party because he was elsewhere (if the crime occurred).

In his second trial the Petitioner continued to rely on his defense of alibi, but he also put forth an additional defense—insanity, which defense is consistent with a defense of alibi. Such a defense in effect admits that the crime occurred and that the defendant committed it, but that he is not subject to punishment for his criminal conduct because he lacked the requisite mental capacity to intend to commit a crime.

While we do not dispute a defendant's right to raise inconsistent defenses, we submit that the jury and the trial judge have the right to consider the inconsistency in fixing a sentence. Thus the Court and jury could properly conclude that it would be physically impossible for the Petitioner to not commit the crime because he was elsewhere, and at the same time commit the crime while he was insane. One version of his defense must therefore be false and analogous to perjury—a sufficient reason to justify a harsher sentence. See *U.S. v. Sanders,* 435 F.2d 165 (9th Cir., 1970). Assuming that the jury chose to give credit to that part of the Petitioner's story which, in effect, admitted his presence at the crime scene and his conduct in perpetrating the crime, all doubt is removed as to his participation in the crime. These circumstances are, likewise, sufficient to justify a harsher sentence. Compare *U.S. v. Kenlen,* 415 F.2d 557 (10th Cir., 1969).

Additionally, the doctrine set out in *Pearce* prohibiting a harsher sentence on retrial unless supported by facts and reasons in the record, does not even apply where the

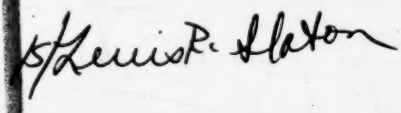
jury, rather than the trial judge fixes the sentence, such as in the case *sub judice*. See also *Kansas City v. Henderson*, 468 S.W.2d 48 (Mo. Sup. Ct., 1971); *Beltowski v. State*, ____ Ky. ____, 183 N.W.2d 563 (Minn., 1971).

Nor can it be argued that the Court (trial judge) abused its discretion in not modifying the sentence fixed by the second jury to that fixed by the first jury, since, under Georgia Code Sections 27-2502 and 27-2709, the Court (trial judge) had no such power in view of the sentence fixed by the jury; and, even if the statutes authorized him to do so, the reasons set forth above were sufficient for him to decline to exercise such discretion, and thus support the judgment setting the Petitioner's sentence at life imprisonment.

CONCLUSION

For the above reasons the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,



LEWIS R. SLATON
District Attorney
3rd Floor
Fulton County Courthouse
Atlanta, Georgia 30303
JOEL M. FELDMAN
Assistant District Attorney
CARTER GOODE
Assistant District Attorney
MORRIS ROSENBERG
Assistant District Attorney
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, JOEL M. FELDMAN, hereby certify that I have this day deposited three copies of the within and foregoing brief for respondent in the case of James Chaffin, Petitioner, v. LeRoy Stynchcombe, Sheriff of Fulton County, Respondent, Docket No. 72-6732 in the Supreme Court of the United States, in a United States mail box, with first class postage prepaid, addressed to Glenn Zell, Esq., Counsel of record for James Chaffin, Petitioner, at his address of record, 15 Peachtree Street, N.E., Atlanta, Georgia 30303.

This 9th day of January, 1973.

Original signed by:

JOEL M. FELDMAN
Of Counsel for LeRoy Stynchcombe,
Sheriff of Fulton County, Respondent

MAR 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-6732

JAMES CHAFFIN - - - - - *Petitioner*

v.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF ATTORNEY GENERAL OF TENNESSEE FOR LEAVE TO FILE OUT OF TIME BRIEF AMICUS CURIAE

BRIEF OF THE ATTORNEY GENERAL OF TENNESSEE AS AMICUS CURIAE LIMITED TO THE FORM OF RELIEF IN THE EVENT OF A DECISION FOR THE PETITIONER

DAVID M. PACK
Attorney General

BART C. DURHAM
Assistant Attorney General
211 Supreme Court Building
Nashville, Tennessee 37219

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-6732

JAMES CHAFFIN,

Petitioner,

v.

LEROY STYNCHCOMBE, SHERIFF
OF FULTON COUNTY,

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

MOTION OF ATTORNEY GENERAL OF TENNESSEE FOR LEAVE TO FILE OUT OF TIME BRIEF AMICUS CURIAE

The Attorney General of Tennessee respectfully would show unto the Court this case was argued February 22, 1973. The decision in this case will not be delayed by a consideration of the narrow issue discussed here by *amicus* —whether, in the event of a holding that on retrial before a jury a more severe penalty cannot be imposed, the Federal District Court appropriately merely should order the excess sentence void, or should the Federal District Court grant an entirely new trial? The proposed brief is attached to this motion in support of the former solution.

WHEREFORE, in the interest of justice and because of the importance of this question, the Attorney General of Tennessee respectfully prays he be allowed to file out of time this brief as *amicus curiae* on the issue of relief.

Respectfully submitted,

DAVID PACK,
Attorney General,

BART C. DURHAM, III,
Assistant Attorney General,
211 Supreme Court Building,
Nashville, Tennessee 37219,
Tel. (615) 741-2091

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-6732

JAMES CHAFFIN,
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v.

LEROY STYNCHCOMBE, SHERIFF
OF FULTON COUNTY

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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DAVID M. PACK
Attorney General

BART C. DURHAM
Assistant Attorney General
211 Supreme Court Building
Nashville, Tennessee 37219

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BRIEF OF THE ATTORNEY GENERAL OF TENNESSEE AS AMICUS CURIAE LIMITED TO THE FORM OF RELIEF IN THE EVENT OF A DECISION FOR THE PETITIONER

Interest of Amicus

The Attorney General of Tennessee represents petitioners in three cases in which certiorari is pending before the Court. The issue is the same as the instant case—the validity of a jury imposed stiffer sentence at the second trial. The cases are *Rose v. Rivera*, No. 72-400 (filed September 8, 1972); *Neil v. Pendergrass*, No. 71-1472 (filed May 11, 1972) and *Linder v. Recor*, No. 71-1281 (filed April 6, 1972). In all

three, the United States Court of Appeals for the Sixth Circuit remanded to the courts of Tennessee for retrial, resentencing by a jury, or resentencing pursuant to Tenn. Code Annot. § 40-2701, as amended by the Tennessee Legislature, Ch. 591, Pub. Acts of 1972.[1]

Amicus is hopeful the Court's opinion, if unhappily it is favorable to petitioner Chaffin, will indicate to the federal courts it is not necessary to have a *third* trial. Rather, the U. S. District Court should strike as void the excess sentence. It would be a burden on Tennessee and other states to retry defendants.

ARGUMENT

Defendants should not be given a windfall wherever at a second trial the sentence imposed is not exactly equal to the sentence imposed at the first. Habeas corpus is broad enough so the judge could enter an order merely enjoining the State from imposing any conditions upon the second sentence more onerous or restrictive than the first sentence. For cases where this was done see *Britt v. Tollett*, 315 F. Supp. 401 (E.D. Tenn. 1970); and *Ward v. Henderson*, 371 F. Supp. 344 (W.D. La. 1970) (where the chief judge of that district found a *Witherspoon*[2] violation and found under Louisiana law it was questionable whether the state court had jurisdiction to reduce a death sentence to life imprisonment. The court, noting it had authority to dispose of the case "as the law and justice require," enjoined Louisiana from executing the petitioner and ordered he "be held in custody under no more onerous

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[1] The retroactivity of this statute has not been determined. Defense counsel are already urging it is not retroactive.

[2] Witherspoon v. Illinois, 391 U.S. 510 (1968).

conditions than had he been sentenced to life imprisonment in the original trial." *Id.* at 348).

The Court said:

> "While it would be desirable in the interest of federal-state comity to look to state procedures and practices to correct the illegal sentence imposed here, the petitioner should not remain under an illegal sentence because the state provides no clear-cut procedures to correct its constitutional error. Especially is this so in light of the state's prior failure to remedy its error here. Nor do we feel that a new trial should be granted with its concomitant difficulties when *Witherspoon* emphatically states that the question of guilt is not affected."

In another *Witherspoon* case, Chief Judge Gordon West of the Eastern District of Louisiana issued the writ of habeas corpus and set aside the death sentence previously imposed upon the petitioner and imposed in its place a sentence of life imprisonment. *Cardinale v. Henderson*, 316 F. Supp. 481 (E.D. La. 1970).

28 U.S.C. §2243(h) provides that "the Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

Carafas v. LaVallee, 391 U.S. 234, 239 (1968) noted that "the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted." *Peyton v. Rowe*, 391 U.S. 54, 66 (1968), held federal habeas corpus gives a court power to fashion appropriate relief other than immediate release, saying "(the writ) is not now and never has been a static, narrow, formalistic remedy ..."

Bozza v. United States, 330 U.S. 160, 166 (1947), teaches that "(t)his Court has rejected the doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed an error in passing sentence," quoting *In Re Bonner*, 151 U.S. 242, 260 (1894).

In *In Re Bonner*, Bonner had been sentenced to a term by a United States territorial court which exceeded that court's authority. This Court quoted the Pennsylvania Supreme Court in saying: "The common law embodies in itself sufficient reason and commonsense to reject the monstrous doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established." *Id.*, at 261. In sending the case back to the lower federal court only for resentencing, this Court said: "The end sought by him—to be relieved from the defects in the judgment rendered to his injury—is secured, and at the same time the community is not made to suffer by a failure in the enforcement of justice against him." *Ibid.*

This Court noted that it "is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus," citing the old habeas corpus section, §761 of the Revised Statutes, which provided that: "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." *Ibid.*

Johnson v. Avery, 393 U.S. 483 (1969), used habeas corpus to strike down a regulation of the Tennessee State

Penitentiary which forbade inmates to write writs for other inmates. The complaint was not treated as a petition for injunctive relief. The relief fashioned, the invalidation of the prison regulation, was accomplished within the framework of traditional federal habeas corpus. Mr. Justice Fortas wrote approvingly that "(t)he District Court treated this motion as a petition for the writ of habeas corpus, and, after a hearing, ordered him released from disciplinary confinement and restored to the status of an ordinary prisoner." *Id.*, at 484.

A District Court has the power given by 28 U.S.C. §2243 either to modify the sentence or to enjoin the warden from holding the prisoner under conditions more stringent than the sentence the prisoner received at his first trial. This should be done rather than allowing a prisoner to possibly "escape punishment altogether because the court committed an error in passing sentence." *In Re Bonner, supra.*

CONCLUSION

In the event this case is decided for the petitioner, the relief granted should be to strike as void the excess sentence.

Respectfully submitted,

BART C. DURHAM, III,
Assistant Attorney General,
211 Supreme Court Building,
Nashville, Tennessee 37219,
Telephone: (615) 741-2091.

DAVID M. PACK
Attorney General

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CHAFFIN *v.* STYNCHCOMBE, SHERIFF

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-6732. Argued February 22, 1973—Decided May 21, 1973

Upon retrial following the reversal of his conviction, petitioner was again found guilty and sentenced by the jury to a greater term than had been imposed by the first jury. After exhausting his state court appeals, petitioner was denied habeas corpus on his claim that imposing a higher sentence on retrial was unconstitutional, and the Court of Appeals affirmed. *Held:* The rendition of a higher sentence by a jury upon retrial does not violate the Double Jeopardy Clause, *North Carolina* v. *Pearce*, 395 U. S. 711, 719–721, and does not offend the Due Process Clause as long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. Nor does the possibility of a higher sentence impermissibly "chill" the exercise of a criminal defendant's right to challenge his first conviction by direct appeal or collateral attack. Pp. 6–13.

455 F. 2d 640, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting statement. STEWART, J., filed a dissenting opinion, in which BRENNAN, J., joined. MARSHALL, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–6732

James Chaffin, Petitioner, *v.* LeRoy Stynchcombe, Sheriff of Fulton County.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 21, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

A writ of certiorari was granted in this case to consider whether, in those States that entrust the sentencing responsibility to the jury, the Due Process Clause of the Fourteenth Amendment bars the jury from rendering higher sentences on retrials following reversals of prior convictions. In *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), this Court established limitations on the imposition of higher sentences by judges in similar circumstances. While we reaffirm the underlying rationale of *Pearce* that vindictiveness against the accused for having successfully overturned his conviction has no place in the resentencing process, whether by judge or jury, we hold today that due process of law does not require extension of *Pearce*-type restrictions to jury sentencing.

I

Early in 1969, petitioner was tried by a jury in a Georgia state criminal court on a charge of robbery by open force or violence, a capital offense at that time. The jury, which had been instructed that it was empowered to impose a sentence of death, life imprison-

ment, or a term of years,[1] found petitioner guilty and sentenced him to 15 years in prison. He appealed to the Georgia Supreme Court, claiming primarily that the trial judge had given an erroneous jury instruction as to the defendant's burden of proving an alibi defense. His claim was rejected and his conviction was affirmed. 225 Ga. 602, 170 S. E. 2d 426 (1969). Thereafter, he renewed that claim in a petition for a writ of habeas corpus to the United States District Court for the Northern District of Georgia. The District Court found petitioner's contention meritorious, granted the writ, and ordered him returned to the state court for retrial.

Upon retrial before a different judge and a new jury, petitioner was again found guilty. A comparison of the trial transcripts in the two cases indicates that the trials were similar in most respects. The case was prosecuted on both occasions by the same State's attorney and the same prosecution witnesses testified to the facts surrounding the alleged robbery. Petitioner, however, was represented by new counsel and, in addition to repeating his alibi defense, he interposed an insanity defense not offered at the former trial. New witnesses were called to testify for both sides on this issue. Also, while petitioner took the stand and made an unsworn statement in each case, his statement at the latter trial was longer and contained autobiographical information not presented to the former jury, including an emotional discussion of his family background, an account of his

[1] Petitioner was indicted under a statute that provided for the following range of punishments:

"Robbery by open force or violence shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment in the penitentiary for life: Provided, however, the jury in all cases may recommend that the defendant be imprisoned in the penitentiary for not less than four years nor longer than 20 years, in the discretion of the court." Ga. Code Ann., § 26–2502 (1935), replaced by Ga. Code Ann., § 26–1902 (1972).

religious affiliation, job history, and previous physical injuries, and a rendition of several religious poems and songs he had written.[2]

The jury instructions on the permissible range of punishment were the same at each trial and the prosecutor at the second trial urged the jury to sentence petitioner to death, as he had in his closing argument at the prior trial.[3] This time, however, the jury returned a sentence of life imprisonment. The parties agree that the jury was not aware of the length of the sentence meted out by the former jury. And, although the jury was informed by one of petitioner's own witnesses that he had been tried previously on the same charge,[4] the jury was not told that petitioner had been convicted and that his conviction had been overturned on collateral attack.[5]

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[2] For a detailed description of the unique unsworn-statement practice in Georgia see *Ferguson* v. *Georgia*, 365 U. S. 570 (1961).

[3] During oral argument in this Court, counsel disagreed as to whether the prosecutor asked for the death penalty at the first trial. Tr. of Oral Arg., at 13, 26, 32–33. At the Court's request, counsel have filed post-argument affidavits on this question. Although the closing arguments themselves were not transcribed, the State prosecutor states that, while his memory is not entirely clear on the matter, his notes indicate, and his customary practice suggests, that he asked for the death sentence at both trials. Any remaining doubt is foreclosed by the affidavit filed by the attorney who represented petitioner during the first trial. He states unequivocally that the prosecutor argued "vigorously" in favor of imposition of the death penalty during the closing argument in that trial.

[4] During the second trial, petitioner's counsel from the first trial was called to testify in petitioner's behalf in support of his insanity defense. The substance of his testimony was that he had an ample opportunity to study petitioner during the previous proceedings and that he was convinced that petitioner was suffering from a "mental defect." He explained that, despite his own evaluation, he acquiesced in petitioner's request that he not interpose an insanity defense at that time.

[5] At the most, then, the jury might have speculated as to whether petitioner's retrial was the product of a mistrial or of a reversal

Claiming primarily that it was improper for the State to allow the jury to render a harsher sentence on retrial, petitioner appealed again to the State Supreme Court. That court affirmed the lower court's judgment and refused to alter petitioner's sentence. 227 Ga. 327, 180 S. E. 2d 741 (1971). He then filed his second application for habeas relief in the Federal District Court, arguing that the higher sentence was invalid under *Pearce*. The District Court disagreed and declined to issue the writ. On appeal to the United States Court of Appeals for the Fifth Circuit, the District Court's judgment was affirmed in an opinion holding that the higher sentence received in this case was not violative of due process. 455 F. 2d 640 (1972). Because two other federal courts of appeals had held to the contrary that *Pearce* restrictions are applicable,[6] we granted certiorari to resolve the conflict. 409 U. S. 912 (1972).

II

Georgia is one of a small number of States that entrust the sentencing function in felony cases to the jury rather than to the judge.[7] While much has been written on

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of a prior conviction. Indeed, counsel for respondent indicated at oral argument that Georgia has many more retrials occasioned by mistrials than retrials following conviction reversals. Tr. of Oral Arg., at 38.

[6] Compare the Fifth Circuit opinion in the instant case (455 F. 2d 640 (1972)), and *Casias* v. *Beto*, 459 F. 2d 54 (CA5 1972), with *Levine* v. *Peyton*, 444 F. 2d 525 (CA4 1971), and *Pendergrass* v. *Neil*, 456 F. 2d 469 (CA6 1972) (cert. pending). State court decisions on this question appear uniformly to hold *Pearce* inapplicable to jury resentencing. See cases discussed in Aplin, Sentence Increases on Retrial After *North Carolina* v. *Pearce*, 39 U. Cin. L. Rev. 427, 430–432 (1970).

[7] Georgia is one of 12 States that provide for jury sentencing in at least some categories of noncapital felony cases. Aplin, *supra*, n. 6, at 429 and n. 10.

the questions whether jury sentencing is desirable [8] and whether it is compatible with the modern philosophy of criminal sentencing that "the punishment should fit the offender and not merely the crime," *Williams* v. *New York*, 337 U. S. 241, 247 (1949), this Court has never expressed doubt about the constitutionality of that practice. See *McGautha* v. *California*, 402 U. S. 183, 196–208 (1971); *Witherspoon* v. *Illinois*, 391 U. S. 510, 519–520 and n. 15 (1968); *Spencer* v. *Texas*, 385 U. S. 554, 560 (1967); *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 405 n. 8 (1966). The States have always enjoyed "wide leeway in dividing responsibility between judge and jury in criminal cases." *Spencer* v. *Texas*, *supra*. If a State concludes that jury sentencing is preferable because, for instance, it guarantees the maintenance of a "link between contemporary community values and the penal system," *Witherspoon* v. *Illinois*, *supra*, or because "juries are more likely to act with compassion, fairness, and understanding than the judge," Stubbs, Jury Sentencing in Georgia—Time For a Change?, 5 Ga. St. B. J. 421, 426 (1969), nothing in the Due Process Clause of the Fourteenth Amendment intrudes upon that choice.

Petitioner does not question this proposition. Instead, he contends that, although the jury may set the sentence, its range of discretion must be subjected to limitations similar to those imposed when the sentencing function on retrial is performed by the judge. While pri-

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[8] See, *e. g.*, Stubbs, Jury Sentencing in Georgia—Time For a Change?, 5 Ga. St. B. J. 421 (1969); Note, Jury Sentencing in Virginia, 53 Va. L. Rev. 968 (1967); President's Comm'n on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society 145 (1967), and ABA Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 1.1 (Approved Draft, 1968) (both recommending the abolition of jury sentencing).

mary reliance, therefore, is placed on this Court's recent opinion in *Pearce*, petitioner asserts three distinct due process claims: (A) higher sentences on retrial violate the double jeopardy provision of the Fifth Amendment, made binding on the States through the Due Process Clause of the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784, 793–796 (1969); (B) higher sentences occasioned by vindictiveness on the part of the sentencing authority violate traditional concepts of fairness in the criminal process; and (C) the possibility of a higher sentence, even absent a reasonable fear of vindictiveness, has an impermissible "chilling effect" on the exercise of the rights to appeal and to attack collaterally a conviction. Each claim will be considered separately.

A

The question presented in *Pearce*, arising in the context of judicial resentencing, was framed as follows: "When at the behest of the defendant, a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?" 395 U. S., at 713. In addressing first the double jeopardy claim, the Court recognized the long-accepted power of a State "to *retry* a defendant who has succeeded in getting his first conviction set aside," *id.*, at 720 (emphasis in original); *United States* v. *Tateo*, 377 U. S. 463 (1964), and, as a "corollary" of that power, "to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." 395 U. S., at 720.

The foundational precedent from which the Court's view of resentencing discretion derives is *Stroud* v. *United States*, 251 U. S. 15 (1919), a case which, because it involved jury resentencing, is central to the double jeopardy claim in the present case. Robert Stroud, popularly

known as "The Birdman of Alcatraz," [9] was indicted for the murder of a federal prison guard at Leavenworth, Kansas. After being convicted and sentenced by a jury to life imprisonment, he won a retrial upon a confession of error by the Solicitor General. His retrial resulted in another verdict of guilty of murder in the first degree and a sentence, again imposed by the jury, of death. On a direct appeal, a unanimous Court held that despite the harsher sentence on retrial Stroud had not been "placed in second jeopardy within the meaning of the Constitution." *Id.*, at 18.

The Court in *Pearce* reaffirmed that decision, emphasizing that it now constitutes a " 'well-established part of our constitutional jurisprudence' " which rests on the "premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." 395 U. S., at 720–721. Petitioner, relying on the dissenting views of MR. JUSTICE DOUGLAS and Mr. Justice Harlan expressed in their separate opinions in *Pearce*, *id.*, at 726, 744, urges the Court to overrule *Stroud*,[10] a step which, for the reasons stated in *Pearce*, we again decline to take.

B

Petitioner's second contention focuses on the problem of vindictiveness. In *Pearce* it was held that vindictiveness, manifesting itself in the form of increased sentences upon conviction after retrial, can have no place in the resentencing process. Under our constitutional system it would be impermissible for the sentencing authority to mete out higher sentences on retrial as punishment for those who successfully exercised their right to ap-

[9] See T. Gaddis, Birdman of Alcatraz (1955); R. Stroud, Diseases of Canaries (1935); R. Stroud, Digest on the Diseases of Birds (1939); *Stroud* v. *United States*, 283 F. 2d 137 (CA10 1960), cert. denied, 365 U. S. 864 (1961).

[10] Brief of Petitioner, at 9; Tr. of Oral Arg., at 40–41.

peal, or to attack collaterally their conviction.[11] Those actually subjected to harsher resentencing as a consequence of such motivation would be most directly injured, but the wrong would extend as well to those who elect not to exercise their rights of appeal because of a legitimate fear of retaliation. Thus, the Court held that fundamental notions of fairness embodied within the concept of due process required that convicted defendants be "freed of apprehension of such a retaliatory motivation." *Id.*, at 725. To that end, the Court concluded that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Id.*, at 726. And, as a further prophylaxis, it was stated that those reasons must be based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Ibid.*

Petitioner seeks the extension of the *Pearce* rationale to jury sentencing. That decision, as we have said, was premised on the apparent need to guard against *vindictiveness* in the resentencing process. *Pearce* was not written with a view to protecting against the mere possibility that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process. *Id.*, at 723.

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[11] While there is no *per se* constitutional right to appeal, this Court has frequently held that once a State establishes an appellate forum it must assure access to it upon terms and conditions equally applicable and available to all. 395 U. S., at 724; *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Douglas* v. *California*, 372 U. S. 353 (1963); *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966). See also *Johnson* v. *Avery*, 393 U. S. 483 (1969).

Subsequent cases have dispelled any doubt that *Pearce* was premised on the hazard of vindictiveness. In *Moon* v. *Maryland*, 398 U. S. 319 (1970), a case granted with a view to determining the retroactivity of *Pearce*, the Court ordered the case dismissed as improvidently granted when it became clear that there was no claim there that the higher sentence received on retrial was a product of vindictiveness on the part of the sentencing judge. Because counsel for the reconvicted defendant eschewed that contention, the Court held that "there is no claim in this case that the due process standard of *Pearce* was violated." *Id.*, at 320. A similar focus on actual vindictiveness is reflected in the decision last Term in *Colton* v. *Kentucky*, 407 U. S. 104 (1972). The question in that case was whether the *Pearce* principle applied to bar the imposition of a higher sentence after a *de novo* trial in those jurisdictions that employ a two-tier system of trial courts. While noting that "[i]t may often be true that the [*de novo* "appeal" court] will impose a punishment more severe than that received from the inferior court," *id.*, at 117, we were shown nothing to persuade us that "the hazard of being *penalized* for seeking a new trial, which underlay the holding of *Pearce*, also inheres in the *de novo* trial arrangement." *Id.*, at 116 (emphasis supplied). In short, the Due Process Clause was not violated because "the possibility of vindictiveness" was not found to inhere in the two-tier system. *Ibid.*

This case, then, is controlled by the inquiry into possible vindictiveness counseled by *Pearce*, *Moon*, and *Colton*. The potential for such abuse of the sentencing process by the jury is, we think, *de minimis* in a properly controlled retrial. The first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence. It has been conceded in this case that the jury was not informed of the prior sen-

tence. We have no reason to suspect that this is not customary in a properly tried jury case. It is more likely that the jury will be aware that there was a prior trial, but it does not follow from this that the jury will know whether that trial was on the same charge, or whether it resulted in a conviction or mistrial.[12] Other distinguishing factors between jury and judicial sentencing further diminish the possibility of impropriety in jury sentencing. As was true in *Colton*, the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction. Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals.[13]

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[12] See n. 4, *supra*, and accompanying text. See also n. 14, *infra*.

[13] Finally, depending upon the circumstances, it may be a desirable precaution for the trial judge to give the same instructions on the range of punishment at both trials and for the prosecutor to seek the same sentence in each case. See n. 3, *supra*.

It has been suggested that higher sentences on retrial might result from vindictiveness on the part of the prosecutor. As punishment for a successful appeal, for instance, a prosecutor might recommend to the jury, and strenuously argue in favor of, a higher sentence than he previously sought. No such indication exists on this record since the prosecutor vigorously urged the imposition of the death penalty at the first trial. In any event, it would be erroneous to infer a vindictive motive merely from the severity of the sentence recommended by the prosecutor. Prosecutors often request more than they can reasonably expect to get, knowing that the jury will customarily arrive at some compromise sentence. The prosecutor's strategy also might well vary from case to case depending on such factors as his assessment of the jury's reaction to the proof and to the testimony of witnesses for and against the State. Given these practical considerations, and constrained by

In light of these considerations, and where improper and prejudicial information regarding the prior sentence is withheld,[14] there is no basis for holding that jury resentencing poses any real threat of vindictiveness.[15]

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the bar against his informing the jury of the facts of prior conviction and sentence, the possibility that a harsher sentence will be obtained through prosecutorial malice seems remote. See *Williams* v. *McMann*, 436 F. 2d 103, 105–106 (CA2 1970).

[14] The State agreed at oral argument that it would be improper to inform the jury of the prior sentence and that *Pearce* might be applied in a case in which, either because of the highly publicized nature of the prior trial or because of some other irregularity, the jury was so informed. Tr. of Oral Arg., at 39. We do not decide, however, whether improperly informing the jury would always require limitation of the sentence or whether such error might be cured by careful questioning of the jury venire or by a cautionary jury instruction.

[15] Because we have concluded that jury sentencing is not susceptible to the abuse that prompted the *Pearce* decision, we need not consider what remedy would be required if jury sentencing were subjected to *Pearce*-type restrictions. It is sufficient here to note that because the institution of jury sentencing is unlike judicial sentencing in a number of fundamental ways those restrictions may not be easily invoked. Normally, there would be no way for a jury to place on the record the reasons for its collective sentencing determination, and ordinarily the resentencing jury would not be informed of any conduct of the accused unless relevant to the question of guilt. See Note, *supra*, n. 8, at 978–980; Stubbs, *supra*, n. 8, at 428–429; LaFont, Assessment of Punishment—A Judge or Jury Function?, 38 Tex. L. Rev. 835, 837–842 (1960). These important differences would not be entirely overcome by requiring that jury trials be bifurcated as suggested by the Sixth Circuit in *Pendergrass* v. *Neil*, 456 F. 2d 469, 482 (CA6 1972) (cert. pending). While some jury-sentencing States have adopted bifurcated jury trials, in which the jury assesses the punishment in a separate proceeding after a verdict of guilty has been rendered (see Aplin, *supra*, n. 6, at 430, 441–442; Ga. Code Ann., § 27–2534 (1972)), bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing. It may make little sense to supply the jury with information about the defendant's conduct if the goal

C

Petitioner's final argument is that harsher sentences on retrial are impermissible because, irrespective of their causes and even conceding that vindictiveness plays no discernible role,[16] they have a "chilling effect" on the convicted defendant's exercise of his right to challenge his first conviction either by direct appeal or collateral attack. What we have said as to *Pearce* demonstrates that it provides no foundation for this claim. To the contrary, the Court there intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent

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of jury sentencing is not necessarily to fit the punishment to the offender, and if the jury is, therefore, not concerned about matters considered pertinent to judicial sentencing.

Petitioner and recent court of appeals cases suggest that an approximation of the *Pearce* limitations could be realized either by instructing the jury that it may return no verdict higher than the former sentence, or by empowering the judge to reduce the second sentence whenever it exceeds the former sentence. See *Levine* v. *Payton*, 444 F. 2d 525 (CA4 1971); *Pendergrass* v. *Neil*, 456 F. 2d 469 (CA6 1972) (cert. pending). Although these alternatives would provide an absolute protection from the possibility of vindictiveness, they would also interfere with ordinary sentencing discretion in a manner more intrusive than contemplated by *Pearce*. They would achieve, in the name of due process, the substance of the result we have declined to approve under the Double Jeopardy Clause.

[16] During oral argument, Tr. of Oral Arg., at 11–12, petitioner's counsel seemed to concede the absence of an improper motivation on the jury's part:

"Question. Did the jury know anything about the first trial?

"[Petitioner's Counsel]. No, they did not.

. . . . .

"Question. Was there any possibility of vindictiveness?

"[Petitioner's Counsel]. There is none, obviously not.

"Question. Why not?

"[Petitioner's Counsel]. Because the jury did not know about the first sentence."

effect they might have on the right to appeal. *Colton* likewise represents a view incompatible with petitioner's contention.

Petitioner relies instead on *United States* v. *Jackson*, 390 U. S. 570 (1968), in which the Court held unconstitutional the capital punishment provision of the federal antikidnapping law. By limiting to the jury the power to impose a death sentence, the statute "discouraged" the exercise by the accused of his rights to trial by jury and to plead not guilty. *Id.*, at 581. The Court found that the interest of the Government in having the jury retain the power to render the death penalty could be realized without this imposition on the rights of the accused. Therefore, the sentencing structure of the statute was struck down because it "unnecessarily" and "needlessly chill[ed] the exercise of basic constitutional rights." *Id.*, at 582.[17]

Jackson did not hold, as subsequent decisions have made clear, that the Constitution forbids every government imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights. In *Brady* v. *United States*, 397 U. S. 742 (1970), *Parker* v. *North Carolina*, 397 U. S. 790 (1970), and *North Carolina* v. *Alford*, 400 U. S. 25 (1970), defendants entered pleas of guilty in order to avoid the potential imposition of death sentences by a jury. Each was dissuaded from exercising his rights to a jury trial and to plead not guilty. Each was, in that sense, "discouraged" from asserting his rights, but the Court found

[17] In *Brady* v. *United States*, 397 U. S. 742 (1970), the Court succinctly articulated the narrow holding in *Jackson:*

"Because the *legitimate goal* of limiting the death penalty to cases in which a jury recommends it *could be achieved* without penalizing those defendants who plead not guilty and elect a jury trial, the death penalty provision 'needlessly penalize[d] the assertion of a constitutional right.'" 397 U. S., at 746 (emphasis supplied).

no constitutional infirmity despite the claim in each case that *Jackson* compelled a contrary result. *Brady* is particularly instructive. The Court there canvassed several common plea bargaining circumstances in which the accused in confronted with the "certainty or probability" that, if he determines to exercise his right to plead innocent and to demand a jury trial, he will receive a higher sentence than would have followed a waiver of those rights. 397 U. S., at 751. Although every such circumstance has a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices was upheld as an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas.[18]

Mr. Justice Harlan's opinion for the Court in *Crampton* v. *Ohio*, a companion case to *McGautha* v. *California*, 402 U. S. 183 (1971), deals at some length with the constitutional problems surrounding the imposition of difficult choices in the criminal process and is of particular relevance since it arises in the context of jury sentencing. Petitioner Crampton attacked the Ohio system of conducting capital trials. Ohio allowed the jury to determine guilt and punishment in a single trial and a single verdict, and Crampton complained that due process required a bifurcated trial because in a single trial he could not argue his case for mitigation of punishment to the jury without foregoing his right to remain silent on the issue of guilt. *Id.*, at 220–221. Thus, the free exercise of his Fifth Amendment right to remain silent was "chilled" by the prospect that a harsher jury sentence

[18] The legitimacy of the practice of "plea bargaining," as the Court noted last Term in *Santobello* v. *New York*, 404 U. S. 257 (1971), has not been doubted and where "properly administered" it is to be "encouraged" as an "essential" and "desirable" "component of the administration of justice." *Id.*, at 260–261. See also *Brady* v. *United States*, 397 U. S., at 751–753.

might ensue.[19] The Court did not agree, however, that the burden imposed on that right was impermissible.

In terms pertinent to the case before us today, the Court in *Crampton* stated:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. *Id.*, at 213.

Recognizing that the inquiry, by its very nature, must be made on a case-by-case basis, the Court indicated that the "threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Ibid.* The choice imposed by the Ohio system was similar to the choice frequently faced by a criminal defendant in deciding whether to assert his right to remain silent. And the fact that the consequence of silence might be a harsher sentence was not regarded as a distinguishing factor.

These cases, we think, erase any question whether *Jackson* might call for abrogation of Georgia's unrestricted jury resentencing process. Jury sentencing, based on each jury's assessment of the evidence it hears and appraisal of the demeanor and character of the accused, is a legitimate practice. *Ante*, pp. 4–5.

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[19] The case was argued on the theory that the Ohio single proceeding created "a tension between constitutional rights," 402 U. S., at 211, similar to that involved in *Simmons* v. *United States*, 390 U. S. 377 (1968). The Court declined to decide the case in those terms, 402 U. S., at 212–213, but focused instead on the extent to which the lack of a bifurcated proceeding created a burden on the exercise of the right to remain silent, or, stated differently, encouraged its waiver. *Id.*, at 213–217.

Just as in the guilty plea cases and *Crampton*, an incidental consequence of that practice[20] is that it may require the accused to choose whether to accept the risk of a higher sentence or to waive his rights. We see nothing in the right to appeal or the right to attack collaterally a conviction, even where constitutional errors are claimed, which elevates those rights above the rights to jury trial and to remain silent.

Petitioner was not himself "chilled" in the exercise of his right to appeal by the possibility of a higher sentence on retrial and we doubt that the "chill factor" will often be a deterrent of any significance. Unlike the guilty plea situation and, to a lesser extent, the nonbifurcated capital trial, the likelihood of actually receiving a harsher sentence is quite remote at the time a convicted defendant begins to weigh the question whether he will appeal. Several contingencies must coalesce. First, his appeal must succeed. Second, it must result in an order remanding the case for retrial rather than dismissing outright. Third, the prosecutor must again make the decision to prosecute and the accused must again select trial by jury rather than securing a bench trial or negotiating a plea.[21] Finally, the jury must again convict

[20] We reiterate that we are dealing here only with the case in which jury sentencing is utilized for legitimate purposes and not as a means of punishing or penalizing the assertion of protected rights. *Jackson* and *Pearce* are clear and subsequent cases have not dulled their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is "'patently unconstitutional.'" *Shapiro* v. *Thompson*, 394 U. S. 618, 631 (1969).

[21] A footnote in the Court of Appeals opinion indicates that petitioner argued in that court that unrestricted jury resentencing would have an impermissible "chilling effect" on his right to select a jury trial upon retrial. 455 F. 2d, at 641 n. 7. Although this argument is not mentioned in his appellate brief in this Court, petitioner's counsel touched on it briefly at oral argument. Tr. of

and then ultimately the jury or the judge must arrive at a harsher sentence in circumstances devoid of a genuine likelihood of vindictiveness. While it may not be wholly unrealistic for a convicted defendant to anticipate the occurrence of each of these events,[22] especially in the

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Oral Arg., at 13–14. What we have said here regarding the collective force of *Pearce*, *Colton*, the guilty plea cases, and *Crampton* should make clear that this claim is without merit. *Jackson* is not to the contrary. Unlike that case, the choice here is subject to considerable speculation. Applying *Pearce*, the judge may or may not give a sentence as high as the jury might give. More importantly, the discouraging effect cannot be said to be "needless." 390 U. S., at 583. The perimeters of judge and jury sentencing power, given the binding nature of *Pearce*, can only be made coterminous by either (1) restricting the jury's power of independent assessment, or (2) requiring jury sentencing in every felony case irrespective whether guilt is determined by a bench trial or a guilty plea after reversal of the conviction. Either alternative would interfere with concededly legitimate state interests, and thus the burden imposed on the right to trial by jury is no less "necessary," *post*, at 7–9 (MR. JUSTICE MARSHALL, dissenting), than the burdens tolerated in *Brady* and *Crampton*. Where the burden of the choice is as speculative as this one is, such incursions upon valid state interests are not justified.

[22] In practical terms, as those closest to the criminal appellate process well know (see Hermann, Frivolous Criminal Appeals, 47 N. Y. U. L. Rev. 701 (1972); Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542 (1969)), the likelihood that a convicted defendant will forego his right to appeal or to attack collaterally his conviction has been diminishing in recent years, in part as a consequence of decisions removing roadblocks and disincentives to appeal. See, *e. g.*, *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Douglas* v. *California*, 372 U. S. 353 (1963); *Anders* v. *California*, 386 U. S. 738 (1967); *Johnson* v. *Avery*, 393 U. S. 483 (1969); *Younger* v. *Gilmore*, 404 U. S. 15 (1971). Available statistical evidence, from both the federal and state criminal systems, demonstrates that the volume and rate of appeal have risen steadily over the last few years. In a criminal system in which appeal is the rule rather than the exception, the possibility of a higher sen-

infrequent case in which his claim for reversal is strong and his first sentence was unusually low, we cannot agree with petitioner that such speculative prospects interfere with the right to make a free choice whether to appeal.

III

Guided by the precedents of this Court, these are the conclusions we reach. The rendition of a higher sentence by a jury upon retrial does not violate the Double Jeopardy Clause. Nor does such a sentence offend the Due Process Clause so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. The choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be "difficult," does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction.

Affirmed.

MR. JUSTICE DOUGLAS dissents for the reasons stated in his dissenting opinion in *Moon* v. *Maryland*, 398 U. S. 319, 321 (1970). He also agrees with MR. JUSTICE STEWART and MR. JUSTICE MARSHALL that establishing one rule for resentencing by judges and another for resentencing by juries burdens the defendants right to choose to be tried by a jury after a successful appeal. *United States* v. *Jackson*, 390 U. S. 570 (1968).

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tence is a remote consideration. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Criminal Appeals 19–21 (Approved Draft, 1970) ("The trend today is clearly toward a much higher rate of appeal."); Administrative Office of the U. S. Courts, 1972 Annual Report of the Director II–11 (direct criminal appeals in 1972 up nearly 25% from 1971); Carrington, *supra*, at 545 (approximately a 200% increase in federal direct criminal appeals from 1959–1960 to 1966–1967).

SUPREME COURT OF THE UNITED STATES

No. 71-6732

James Chaffin, Petitioner, *v.* LeRoy Stynchcombe, Sheriff of Fulton County.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 21, 1973]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

In *North Carolina* v. *Pearce*, 395 U. S. 711, 725, the Court held that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." As I see it, there is a real danger of such vindictiveness even when a jury rather than a judge imposes the sentence after retrial. Because the Court today declines to require any procedures to eliminate that danger, even though procedures quite similar to those adopted in *Pearce* could readily be applied without sacrificing the values of jury sentencing, I must dissent.

The true threat of vindictiveness at a retrial where the jury metes out the sentence comes from the trial judge and prosecutor. Either or both might have personal and institutional reasons for desiring to punish a defendant who has successfully challenged his conviction. Out of vindictiveness the prosecutor might well ask for a sentence more severe than that meted out after the first trial, and a judge by the manner in which he charges the jury might influence the jury to impose a higher sentence at the second trial. In the present case, for example, while the petitioner was sentenced to 15-years imprisonment after his first trial, on retrial the prosecutor asked the jury to impose the death penalty, and the

judge instructed the jury that they could inflict that punishment. It is said that the prosecutor and judge gave the jury the option to impose capital punishment at the retrial simply as a tactical move to assure that the petitioner would again receive at least a 15-year sentence. But it is not inconceivable in this setting that a prosecutor or a judge might seek to secure a higher sentence for a defendant in order to punish him for his successful appeal.*

It was to purge that possibility of retaliation that *Pearce* required prophylactic measures for judicial sentencing. Without such procedures, as the Court pointed out in *Pearce*, it would be extremely difficult for a defendant to establish that his higher sentence was the result of a retaliatory motivation.

I agree with the Court today that some measures are ill suited to eliminating the possibility of retaliation in a case where the jury imposes the sentence. For example, the jury ought not to be told that its sentencing power is limited by the term imposed at the first trial, for the jury might then impose a less severe sentence in reaching a compromise verdict. But there is no reason why the trial judge should not be compelled to reduce any sentence imposed by the jury after retrial to that imposed after the first trial, unless he can affirmatively set forth the kind of reasons required in *Pearce* for the increased sentence. "Those reasons must be based upon objective information concerning identifiable conduct on

*The Court finds the possibility of prosecutorial malice "remote." *Ante*, p. —. The only basis for that conclusion appears to be that the prosecutor may have quite innocent strategic reasons for requesting an increased sentence after a retrial. But that does not foreclose the possibility that a prosecutor might have quite vindictive reasons for seeking a more severe penalty, and it underlines the extraordinary difficulty a defendant would have in attempting to prove a retaliatory motivation.

the part of the defendant occurring after the time of the original sentencing proceeding." 395 U. S., at 726.

As in *Pearce*, that procedure would serve to minimize the possibility that vindictiveness had played a role in the sentence a defendant received after a new trial, and it would free a convicted man from the fear that a successful challenge to his conviction might lead to a vindictively imposed harsher sentence after a second trial. Since this measure would, at the most, reinstate the sentence imposed by the original jury, none of the basic purposes served by jury sentencing would be jeopardized.

I also agree with my Brother MARSHALL that allowing a more severe sentence to be imposed by a jury on retrial, when that sentence would be impermissible for a judge to impose, is an infringement upon a defendant's constitutional right to a jury trial. See *United States* v. *Jackson*, 390 U. S. 570. Requiring that a judge reduce a jury-imposed sentence to that imposed after the first trial, unless he can make the kind of findings required by *Pearce*, would eliminate that illegitimate burden upon a constitutional right.

SUPREME COURT OF THE UNITED STATES

No. 71–6732

James Chaffin, Petitioner, *v.* LeRoy Stynchcombe, Sheriff of Fulton County.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 21, 1973]

MR. JUSTICE MARSHALL, dissenting.

I cannot agree with the Court that it is permissible for a jury, but not for a judge, to give a defendant on his retrial a sentence more severe than the one he received in his first trial, without specifying particular aspects of his behavior since the time of his first trial that justify the enhanced sentence. Such a rule is defective in two ways. First, the Court acknowledges that a jury violates the Constitution when it gives such a defendant a more severe sentence to punish him for successfully taking an appeal. *Ante*, pp. 9–11. Yet, when the costs, in terms of other values served by juries, of the methods preventing, detecting, and remedying that kind of violation are balanced against the minor degree to which restrictions on jury resentencing impair the values served by jury sentencing, the need to vindicate the constitutional right warrants restrictions on juries similar to those we placed on judges in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). Second, as in *United States* v. *Jackson*, 390 U. S. 570 (1958), the possibility that a jury might increase a sentence for reasons that would be unavailable to a judge unnecessarily burdens the defendant's right to choose a jury trial. I therefore respectfully dissent.

I begin with what appears to be common ground. If the jury on retrial has been informed of the defendant's

prior conviction and sentence, the possibility is real that it will enhance his punishment simply because he successfully appealed. The Court apparently agrees, *ante*, pp. 10 n. 13, 11 nn. 14–15, and suggests that a variety of preventive and remedial measures must be taken to minimize that possibility. Those measures, I believe, are too intrusive on the process of selecting the jury and insulating its deliberations from inquiry. In *Pearce* we devised a remedy for judicial vindictiveness in sentencing that was broader than the constitutional vice, because a remedy more closely tailored to the vice would too severely intrude on the process by which the judge made his sentencing decisions. A similar remedy is justified for the same reasons in the case of jury resentencing.

Of course a jury that does not know of a prior conviction and sentence cannot take them into account when it resentences the offender. But there is a real possibility that a jury will know of a prior sentence and will enhance the punishment it imposes out of vindictiveness as the Court apparently concedes in limiting its holding to "properly controlled retrial[s]." *Ante*, p. 9. And only when the possibility of vindictiveness can confidently be said to be *de minimis* can *Pearce* be distinguished. Even in *Pearce* we acknowledged the difficulty in establishing that sentences were frequently enhanced out of vindictiveness. 395 U. S., at 725 n. 20. Indeed, we could cite only studies that showed that increased sentences on reconviction were "far from rare," *ibid.*; we had before us no evidence at all that vindictiveness actually played a part in a substantial number of cases where sentences were increased.[1]

[1] I assume that the Court would treat jury sentencing as it treated judge sentencing in *Pearce* if it were presented with the same kind of evidence we drew on in *Pearce*. Cf. *Witherspoon* v. *Illinois*, 391 U. S. 510, 516–518 (1968). Because of the differing institutional positions of judges, who will be repeatedly reviewed by appellate

Given the possibility of vindictiveness, a defendant is entitled to a remedy designed to eliminate, or at least minimize, that possibility. It follows, I believe, that the defense is entitled to have prospective jurors asked carefully-framed questions designed to explore their knowledge of a prior conviction and sentence. Cf. *Ham* v. *South Carolina*, 409 U. S. — (1973). But it will inevitably be difficult to frame questions that will do so without informing the jurors of those facts in the very act of questioning them. In addition, the right to have questions asked of prospective jurors would be meaningless unless the defense could challenge jurors for cause solely on the basis of the answers to those questions. Yet nearly all of the States in which jury sentencing is required have large rural areas,[2] where it is quite likely that a retrial after a successful appeal will be a notorious public event. It seems to me probable, then, that the right recognized by the Court will substantially impede expeditious selection of juries, for it will generally be easy to make a threshold showing of local publicity, and may often so severely limit the number of available jurors as to raise serious questions of the representativeness of the jury finally chosen.[3]

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courts, and juries, which are not continuing bodies, cf. *Illinois* v. *Somerville*, 409 U. S. —, — (1973) (opinion of MARSHALL, J.), evidence supporting the inference that vindictiveness may not infrequently influence jury decisions would be especially valuable from cases in which the evidence on retrial was not substantially different from the evidence at the first trial.

[2] In addition to Georgia, these States include Arkansas, Kentucky, Missouri, Oklahoma, Tennessee, and Virginia.

[3] Even on the Court's analysis, if a defendant must proceed to trial before a jury that knows of his prior conviction and sentence, due process would require limitations on the sentence imposed, though such limitations would not be required in "properly conducted retrial[s]." Thus the Court does not today endorse the proposition that limitations on jury sentencing on a retrial are *never* required. See *ante*, p. 11 n. 14. At most, it holds only that, in the absence

The Court suggests that a curative instruction might minimize the possibility that the jury will be improperly influenced by its knowledge of a prior conviction or sentence. *Ante*, n. 14. We have already recognized, however, that it is quite unrealistic to believe that instructions to disregard evidence that a jury might treat in a manner highly prejudicial to a defendant will often be followed. *Jackson* v. *Denno*, 378 U. S. 368, 388–389 (1964); *Bruton* v. *United States*, 391 U. S. 123, 128–137 (1968). Cf. E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 105 (1956). And curative instructions may serve only to highlight the problem. Not every such instruction is ineffective, of course, but I would not burden the judicial process with difficult inquiries into the effectiveness of such an instruction where, as here, the State's interest in having sentences imposed by a jury can easily be satisfied without requiring such inquiries. See *infra*, p. 6.

Finally, a post-sentencing inquiry of a jury that imposes a more severe sentence might disclose that vindictiveness played no part in its sentencing decision. But this could be achieved only by sacrificing the traditional secrecy of jury deliberations. Cf. *Clark* v. *United States*, 289 U. S. 1 (1933), and cases cited therein.

Because of the differing institutional positions of judge and jury,[4] and because the jury that sentences also con-

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of knowledge of the prior conviction and sentence, no limitations are constitutionally compelled.

[4] The Court distinguishes *Pearce* from this case in part on the ground that there "the second sentence [was] meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction," while here "the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication." *Ante*, p. 10. The Court cannot mean that Pearce himself was resentenced by the same judge who sentenced him in the first place, for Pearce was tried before two

victs and so focuses on the facts of the offense, the question of applying the limitations imposed by *Pearce* on resentencing by judges to resentencing by juries would surely be a close one, if only the issue of possible vindictiveness were involved. Since no state interests in jury sentencing would be impaired to any significant degree by imposing such limitations, however, the question should be resolved in favor of limiting the jury's power.

One group of policies underlying jury sentencing derives from the belief that juries will be more humane and compassionate than judges: judges, it is said, represent a centralized government remote from the details of local life, judges who often must seek re-election may be unduly swayed by political considerations that have little impact on jurors, and judges who routinely deal with criminal cases may become callous and insensitive to the human problems of defendants. In contrast, the jury has close ties to the local community, and because it sits only once and then dissolves, its members ordinarily have little experience with criminal offenders. Cf. Note, Jury Sentencing in Virginia, 53 Va. L. Rev. 968, 988–991 (1967). It is somewhat anomalous, however, to contend that because juries are more compassionate than judges, they may impose a sentence more severe than a judge may constitutionally impose. I cannot understand, therefore, how the belief that juries are more compassionate than judges justifies a rule that permits a jury on retrial to impose a sentence more severe than that imposed by the original jury.

The second policy implicated in jury sentencing is that the jury serves as a "link between contemporary com-

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different judges. See *State* v. *Pearce*, 266 N. C. 234, 236 (1966) (Judge Williams at first trial); *State* v. *Pearce*, 268 N. C. 707, 708 (1966) (Judge McLaughlin at second trial). Thus, the only differences in this respect are institutional, not personal: juries are not continuing bodies and may have little interest in deterring appeals or vindicating a colleague.

munity values and the penal system," *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 n. 15 (1968). More accurately than a judge, the jury reflects the community's moral attitude toward the particular offender. The jury's function in sentencing, then, is to make the punishment fit the crime, not the criminal. Limitations on the sentences a jury might impose do impair its ability to decide what punishment fits the crime before it. But in cases like this one, one jury has already determined what it, as a representative of community views, thinks is an appropriate sentence. Indeed, it has done so after a trial in which reversible error, presumably prejudicial to the defendant, occurred. Thus, this state interest is not substantially impaired by limitations designed to preclude the second jury from imposing a sentence based, in part, on a desire to punish the defendant for taking an appeal.

In short, even if only the question of vindictiveness were involved in the case of jury resentencing, I would hold that limitations similar to those in *Pearce* must be imposed on jury resentencing: alternative methods of minimizing vindictiveness may seriously impair other values, and the limitations of *Pearce* do not greatly affect the values served by jury sentencing.[5] But vindictive-

[5] The Court suggests that the limitations of *Pearce* cannot easily be adapted to jury sentencing. *Ante*, n. 15. But procedures like bifurcation, special verdicts stating the reasons for the sentence imposed or stating that the prior conviction and sentence were not taken into account, instructing the jury that the maximum sentence available to it is that imposed earlier, or empowering the judge to reduce the sentence if it exceeds the prior sentence, are some obvious alternatives. The Court suggests that the first two are inconsistent with the basic purpose of jury sentencing—making the punishment fit the crime—and that the latter two "would achieve, in the name of due process, the substance of the result we have declined to approve under the Double Jeopardy Clause." *Ibid.* The latter point confuses limitations imposed by the Constitution with

ness alone is not the only issue here. For, by establishing one rule for sentencing by judges and another for sentencing by juries, the Court places an unnecessary burden on the defendant's right to choose to be tried by a jury after a successful appeal.

We held unconstitutional in *United States* v. *Jackson*, 390 U. S. 570 (1968), a sentencing structure that placed an unnecessary burden on a defendant's right to a jury trial. The Court today purports to distinguish *Jackson* on the ground that subsequent cases show that *Jackson* does not make unconstitutional sentencing structures that impose a burden on the exercise of constitutional rights as "an incidental consequence." *Ante*, p. 16. Yet in *Jackson* we said, "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." *Id.*, at 582. *Brady* v. *United States*, 397 U. S. 742 (1970), and *Crampton* v. *Ohio*, 402 U. S. 183 (1971), the cases that the Court now relies on, did not overrule *Jackson;* nor did they change the constitutional test. The question is still whether the burden on the exercise of the right to be tried by a jury is necessary, not whether it is only incidental to the accomplishment of some legitimate state purpose.

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choices a State might make to carry out the policies it seeks to vindicate through jury sentencing; if a State chooses to impose a maximum limit on resentencing instead of establishing a bifurcated procedure, for example, the result is not, even in substance, the result urged under the Double Jeopardy Clause, for it results from choice among alternatives and not from constitutional commands. Similarly, bifurcation may inject into jury sentencing considerations that the State thinks are irrelevant to its purposes in establishing a system in which juries are the sentencing authority, and it may decide to adopt some other method of complying with the constitutional requirements. But surely there is no clear conflict between bifurcation or special verdicts and the purposes of jury sentencing.

In *Brady*, a defendant sought to vacate his guilty plea on the ground that he had pleaded guilty only to avoid capital punishment, under a statute that provided for the death penalty only on the recommendation of the jury. The Court viewed his argument as applicable to every kind of inducement that the prosecution offers to a defendant in order to elicit a plea of guilty. See 397 U. S., at 750–753. Thus, on the Court's analysis, upholding his challenge would have necessarily invalidated the widespread practice of plea bargaining, which the Court thought essential to our system of criminal justice. The burden on the exercise of a defendant's right not to incriminate himself was therefore necessary, in the terms of the analysis required by *Jackson*.

Similarly, the defendant in *Crampton* contended that failure to separate the trial of a capital case into a guilt-determining phase and a sentencing phase deterred him from testifying to facts bearing on sentence alone, for to testify would have opened him up to impeachment and to questions bearing on guilt. To the Court, however, such pressure was indistinguishable from that placed on him by a very powerful case for the prosecution that might require rebuttal, or by a large number of other widely accepted procedural rules. See 402 U. S., at 213–216. As in *Brady*, then, the Court could not agree with the defendant without holding unconstitutional many procedures that it thought essential to the criminal process.

Both *Brady* and *Crampton* applied the test of necessity. The Court today does not, as it concedes when it says that "[where] the burden . . . is as speculative as this one is," constitutional limitations on resentencing are not justified. *Ante*, n. 21. But *Jackson*, *Brady*, and *Crampton* did not involve assessments of the relative

severity of the burden on the right to choose to be tried by a jury;[6] they turned on the question of strict necessity.[7] No legitimate state interest is materially advanced by permitting a second jury to enhance punishment without limitations like those placed by *Pearce* on judges, and such limitations would not substantially affect any such interest. Thus the rule endorsed by the Court today is unnecessary, yet it unquestionably burdens a defendant's choice of jury trial after a successful appeal.[8]

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[6] Georgia permits a defendant to plead not guilty and waive his right to jury trial. See *Berry* v. *State*, 61 Ga. App. 315, 65 S. E. 148 (1939). Of the States with jury sentencing, apparently only Kentucky does not permit such a waiver. See *Meyer* v. *Commonwealth*, 472 S. W. 2d 479, 482 (Ky. 1971). Where the prosecution must agree to such a waiver, cf. Fed. Rule Crim. Proc. 23 (a), it would of course be impermissible to refuse agreement solely because a judge would be restricted in resentencing while a jury would not, cf. *Singer* v. *United States*, 380 U. S. 24, 37 (1965).

[7] In discussing whether the holding today burdens the right to appeal, the Court says that for the undesired outcome to occur, "[s]everal contingencies must coalesce." Thus, "the likelihood of actually receiving a harsher sentence is quite remote at the time a convicted defendant begins to weigh the question whether he will appeal." *Ante*, p. 16. But, of the list the Court provides, only two remain contingent when the defendant must decide to waive or insist upon a jury trial—reconviction and sentence. The Court acknowledges that in some cases, even when all the contingencies must be taken into account, the possibility of a harsher sentence might well affect the decision to appeal. *Ante*, pp. 17–18. The burden will surely be substantial when the contingencies are reduced to two.

[8] The Court, in its footnote discussing this argument, does assert that the burden "cannot be said to be 'needless.'" *Ante*, n. 21. The sentence following that assertion does not supply any reason why the burden is necessary; it simply states two ways in which the burden might be eliminated without saying why those alternatives are so impractical as to make necessary the burden that after today's decision, may be placed on the right to jury trial.

I believe that *Pearce* and *Jackson* require that States with jury sentencing adopt procedures by which juries resentencing an offender are precluded from considering the fact that the offender successfully appealed in determining the new sentence, and so I dissent.